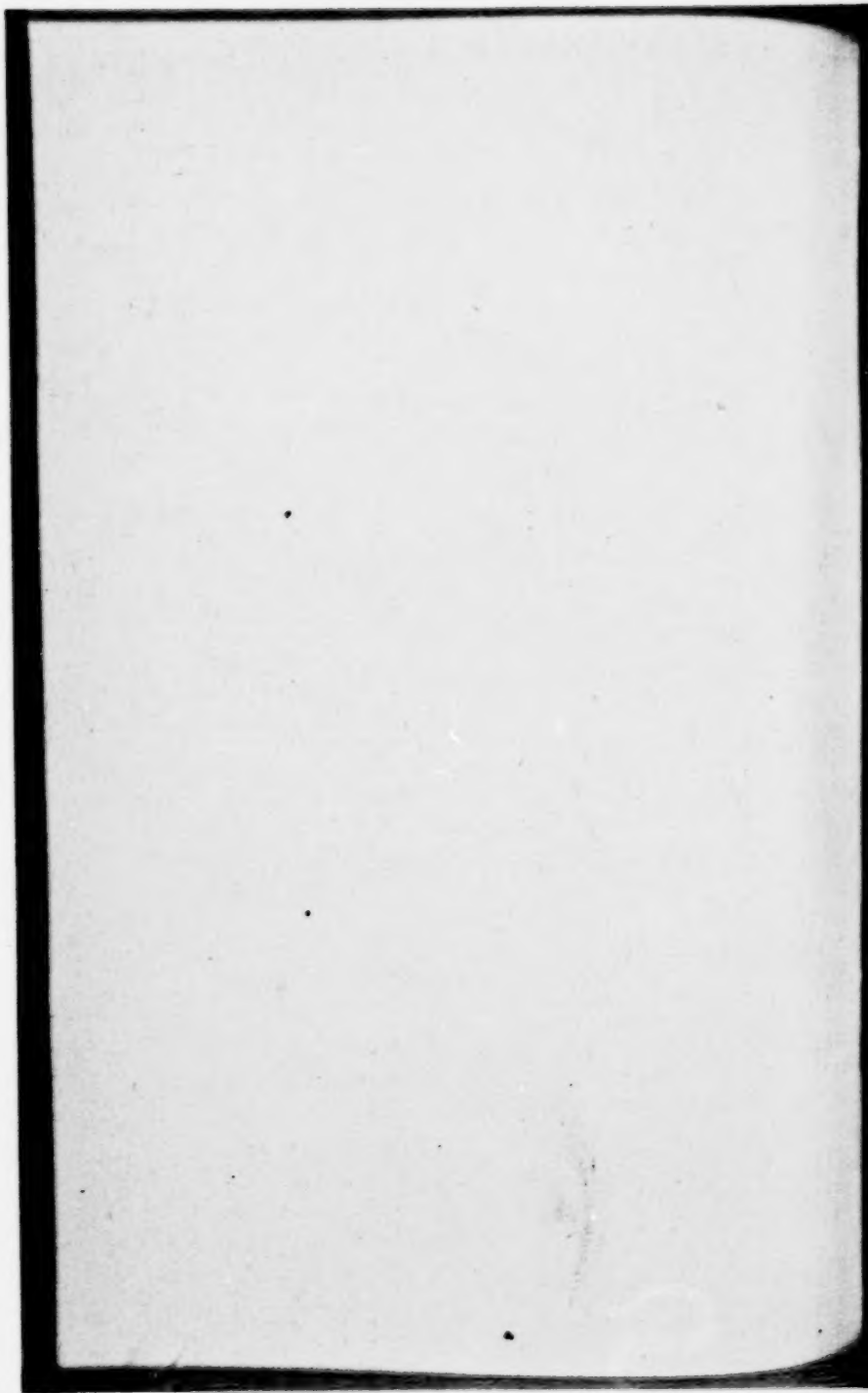


TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATESOCTOBER TERM, **1920**No. **200****FREY & SON, INCORPORATED, A CORPORATION,
PLAINTIFF IN ERROR,***versus***THE CUDAHY PACKING COMPANY, A CORPORATION,
DEFENDANT IN ERROR.****IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT.**

Record filed**NOV 11 1919**



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(1-a) UNITED STATES OF AMERICA, ss:

At a United States Circuit Court of Appeals for the Fourth Circuit, begun and held at the Court House, in the City of Richmond, State of Virginia, on the first Tuesday in October, being the seventh day of the same month, in the year of our Lord one thousand nine hundred and nineteen.

Present: Hon. J. C. Pritchard, Circuit Judge; Hon. Martin A. Knapp, Circuit Judge; Hon. Charles A. Woods, Circuit Judge.

Among other were the following proceedings, to-wit:

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

versus

Frey & Son, Incorporated, a corporation, Defendant in
Error.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE DISTRICT OF MARYLAND, AT BALTIMORE.

Be it remembered that heretofore, to-wit, on September 25, 1917, the transcript of the record of the said District Court in the said entitled cause was transmitted to and filed in our said Circuit Court of Appeals at Richmond, Virginia, which is as follows:



TRANSCRIPT OF RECORD.

UNITED STATES OF AMERICA,

DISTRICT OF MARYLAND,

To-wit:

At a District Court of the United States for the District of Maryland, begun and held at the City of Baltimore on the first Tuesday in June (being the 5th day of the same month), in the year of our Lord one thousand nine hundred and seventeen.

Present: The Honorable John C. Rose, Judge Maryland District; Samuel K. Dennis, Esq., Attorney; William W. Stockham, Esq., Marshal; Arthur L. Spamer, Clerk.

Among other were the following proceedings, to-wit:

Frey & Son, Incorporated, a corporation, Plaintiff,

vs.

The Cudahy Packing Company, a corporation, Defendant.

} Law Docket.
No. 274

DECLARATION.

(2) Filed May 10, 1915.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

Frey & Son, Incorporated, a corporation, Plaintiff,

vs.

The Cudahy Packing Company, a corporation, Defendant.

No. ———

DECLARATION.

FIRST COUNT.

The plaintiff, Frey & Son, Incorporated, a corporation, duly incorporated under the laws of the State of Maryland, sues the defendant, The Cudahy Packing Company, a corporation duly incorporated under and by virtue of the laws of the State of Illinois, and doing business and having an agent in the City of Baltimore, State of Maryland, and within the jurisdiction of this court, for that whereas, the plaintiff at and before the happening of the grievances hereinafter mentioned, was and still is, engaged in the wholesale grocery business at the corner of Pratt and Commerce Streets, in the City of Baltimore, State of Maryland, within the jurisdiction of this court, and being engaged in said business aforesaid, the said plaintiff is proprietor of the said wholesale grocery store aforesaid, and sells large quantities of groceries and kindred articles not only to the persons in the City of Baltimore, State of Maryland, but throughout the said State and throughout the States adjacent thereto, and in a number of States in the Southern part of the United States, and that among the articles sold in wholesale grocery stores is Old Dutch Cleanser, the same being a powdered form of scouring (3) compound and is used by a great number of people, and that prior to the grievances hereinafter mentioned, the said plaintiff sold in its said store aforesaid, large quantities of the said Old Dutch Cleanser, to the value of, to-wit, Fifteen Thousand Dollars worth per year.

Plaintiff further says that among the wholesale grocers in the City of Baltimore, and among the wholesale grocers in the State of Maryland, and in the territory in which plaintiff sells his goods, great competition exists, and among other things sold by said wholesale grocers carrying on a business similar to that of plaintiff is the said Old Dutch Cleanser, which is a staple article, and an article ordinarily sold in said wholesale grocery stores.

Plaintiff further says that the defendant, The Cudahy Packing Company, is engaged in the City of Chicago, State of Illinois, in the manufacture of said Old Dutch Cleanser, which said Old Dutch Cleanser is as

stated aforesaid, a staple article and is sold generally throughout the United States, and all first-class grocers sell the said Old Dutch Cleanser, and the said defendant sells the said Old Dutch Cleanser to all jobbers and wholesale grocers throughout the United States.

Plaintiff further says that the said defendant, the said corporation aforesaid, has entered into an agreement with most of the jobbers, wholesale grocers, and other groceries throughout the United States, by which agreement it sells to said jobbers, wholesale grocers and other grocers said Old Dutch Cleanser upon the condition that they, the said jobbers, wholesale grocers and other grocers will sell said Old Dutch Cleanser for certain fixed prices, and that the said contract aforesaid requires of the said jobbers and the said wholesale grocers that they will not sell to retailers unless they sell at a certain specific price, and the said retailers and other dealers are required to promise and agree to sell said Old Dutch Cleanser at a fixed price to the public. And (4) in the contract with the jobbers and wholesalers the said defendant requires that they sell the said Old Dutch Cleanser at a fixed and certain price to be determined by the said defendant and not by the said jobbers, wholesale grocers and other grocers who purchase the said Old Dutch Cleanser.

Plaintiff further says that the said agreement aforesaid was and is in restraint of trade, and is null and void in that it limits or restrains the sale of said Old Dutch Cleanser in such a way as to prevent and hinder the plaintiff in its business, and prevent and hinder it from having the said Old Dutch Cleanser in stock in its store in order that it may sell the same to grocers and other persons throughout the State of Maryland and other States.

Plaintiff further says that the said defendant aforesaid, to-wit, on the fourth day of February, 1914, and at divers times before and since that time, has refused to sell to the said plaintiff said Old Dutch Cleanser unless the said plaintiff would enter into the contract aforesaid; and said plaintiff further says that the said defendant has tried to prevent jobbers and other wholesale grocers from selling to the said plaintiff, and that although said Old Dutch Cleanser is a staple article as stated aforesaid and should be on sale in the store of the said plaintiff in order that it may sell it to other gro-

cers and persons using the same, the said plaintiff is unable to obtain the same unless it enters into an agreement as stated aforesaid, and agrees with the said company that it as a wholesaler will sell the Old Dutch Cleanser at a price fixed by the said defendant.

Plaintiff further says that it has refused to enter into said combination or contract because the same is unlawful and in restraint of trade, and by not having the said Old Dutch Cleanser on sale in its store aforesaid, the said plaintiff is deprived of a large number of customers and that by not having the said Old Dutch Cleanser on sale in its store as aforesaid, it is unable to fill numerous orders and demands for the said Old Dutch Cleanser, which orders and demands are made daily upon it by customers and other persons to whom it sells and that by reason of its being unable to sell or having on sale the said Old Dutch Cleanser, a large number of persons who have heretofore been its customers have sent their orders for other goods which plaintiff sells to other wholesale grocers and that by reason of the said action the said plaintiff is deprived not only of the ordinary profits which it would have derived from the sale of said staple articles but has lost numerous customers and large profits on other goods, which it would have sold to said customers.

Plaintiff further says that it is unable to fill orders and demands of the said article, Old Dutch Cleanser, by reason of the said action of the said defendant and that by reason thereof it is greatly injured and damaged.

Plaintiff further says that it as wholesale grocer aforesaid, believes it is right and proper to furnish to all persons desiring to purchase of it all of the ordinary articles on sale in a wholesale grocery store at as reasonable price as same can be furnished, and that for the reasons aforesaid if it purchased of the said defendant, the said Old Dutch Cleanser, under the agreement with the said defendant, it would have to sell it at a fixed and settled price when in truth and fact it can be sold at a price much less than that demanded by the said defendant and the seller thereof make a lawful and ordinary profit thereon.

Plaintiff further says that if it enters into the agreement aforesaid with the said defendant aforesaid, it will violate the law. Plaintiff further says that it, as is stated aforesaid, has a large established business and

that it has been, is, and will in the future, have to compete with those who are wholesale grocers engaged in the business of selling to retail grocers and other stores that sells goods similar thereto and that by reason thereof (6) of and of the said acts aforesaid, it has been, is and still continues to be, greatly injured in its business and property by the said defendant, and it says there has accrued to it a right of action and damages by reason of the said acts aforesaid, and plaintiff claims the sum of Thirty Thousand Dollars (\$30,000.00), and three-fold that amount, to-wit, Ninety Thousand Dollars (\$90,000.00) damages and costs of this suit, including a reasonable attorney's fee.

Wherefore plaintiff brings this suit and claims of the defendant the sum of Thirty Thousand Dollars (\$30,000.00) and three-fold that amount, to-wit, Ninety Thousand Dollars (\$90,000.00), and costs of this suit, including a reasonable attorney's fee.

SECOND COUNT.

The plaintiff, Frey & Son, Incorporated, a corporation duly incorporated under the laws of the State of Maryland, sues the defendant, The Cudahy Packing Company, a corporation duly incorporated under and by virtue of the laws of the State of Illinois, and doing business and having an agent in the City of Baltimore, State of Maryland, and within the jurisdiction of this court, for that whereas, the plaintiff at and before the happening of the grievances hereinafter mentioned, was and still is engaged in the wholesale grocery business at the corner of Pratt and Commerce Streets, in the City of Baltimore, State of Maryland, within the jurisdiction of this court, and being engaged in said business aforesaid, the said plaintiff is proprietor of the said wholesale grocery store aforesaid, and sells large quantities of groceries and kindred articles not only to the persons in the City of Baltimore, State of Maryland, but throughout the said State and throughout the States adjacent thereto, and in a number of States in the Southern part of the United States, and that among the articles sold in wholesale grocery stores is Old Dutch Cleanser, which is a powdered form of scouring compound and is used by a great number of people, and that prior to the grievances hereinafter mentioned, the

(7) said plaintiff sold in its said store aforesaid, large quantities of Old Dutch Cleanser, to the value of, to-wit, Fifteen Thousand Dollars (\$15,000.00) worth per year.

Plaintiff further says that among the wholesale grocers in the City of Baltimore, and among the whole sale grocers in the State of Maryland, and in the territory in which plaintiff sells his goods, great competition exists, and among other things sold by said wholesale grocers carrying on a business similar to that of plaintiff is the said Old Dutch Cleanser, which is a staple article, and an article ordinarily sold in said wholesale grocery stores.

Plaintiff further says that the said defendant, The Cudahy Packing Company, is engaged in the City of Chicago, State of Illinois, in the manufacture of said Old Dutch Cleanser which said Old Dutch Cleanser is as stated aforesaid, a staple article and is sold generally throughout the United States, and all first-class grocers and other stores sell the said Old Dutch Cleanser, and the said defendant sells the said Old Dutch Cleanser to all jobbers and wholesale grocers throughout the United States.

Plaintiff further says that the said defendant, the said corporation aforesaid, has entered into an agreement with most of the jobbers and wholesale grocers and other grocers throughout the United States, by which agreement it sells to said jobbers, wholesale grocers and other grocers said Old Dutch Cleanser, upon the condition that they, the said jobbers, wholesale grocers and other retail grocers will sell said Old Dutch Cleanser for certain fixed prices, and that the said contract aforesaid requires of the said jobbers and the said wholesale grocers that they will not sell to retailers unless they sell at a certain specific price, and the said retailers and other dealers are required to promise and agree to sell said Old Dutch Cleanser at a price fixed to the public. And in the contract with the jobbers and (8) wholesalers the said defendant requires that they sell the said Old Dutch Cleanser at a fixed and certain price to be determined by the said defendant and not by the said jobbers, wholesale grocers and other grocers who purchase the said Old Dutch Cleanser.

Plaintiff further says the said agreement aforesaid was and is in restraint of trade, and is null and void in

that it limits or restrains the sale of said Old Dutch Cleanser in such a way as to prevent and hinder the plaintiff in its business, and prevent and hinder it from having the said Old Dutch Cleanser in stock in its store in order that it may sell the same to grocers and other persons throughout the State of Maryland and other States.

Plaintiff further says that the said defendant aforesaid, on to-wit, the 12th day of March, 1915, refused to sell to the said plaintiff, the said Old Dutch Cleanser, at a price sold by the said defendant to persons similarly situated as the said plaintiff, but demands and demanded an exorbitant and prohibitive price therefore, it being the object of the said defendant to prevent the said plaintiff from purchasing said Old Dutch Cleanser at a price that it can sell the same at a reasonable price to retail grocers and other persons who purchase the same in order to sell to the public, the said defendant attempting thereby to compel the said plaintiff to sell at a fixed price, which the said plaintiff refused to do.

Plaintiff further says that the said defendant has tried to prevent jobbers and other wholesale grocers from selling to the said plaintiff, and that although said Old Dutch Cleanser is a staple article as stated aforesaid, and should be on sale in the store of the said plaintiff in order that it may sell it to other grocers and persons using the same, and said plaintiff is unable to obtain the same unless it enters into an agreement as stated aforesaid, and agrees with the said company that it as a wholesaler will sell the said Old Dutch Cleanser at a price fixed by the said defendant.

(9) Plaintiff further says that it has refused to enter into said combination or contract because the same is unlawful and in restraint of trade, and by not having the said Old Dutch Cleanser on sale in its store aforesaid, the said plaintiff is deprived of a large number of customers, and that by not having the said Old Dutch Cleanser on sale in its store as aforesaid it is unable to fill numerous orders and demands for the said Old Dutch Cleanser which orders and demands for the said Old Dutch Cleanser are made daily upon it by customers and other persons to whom it sells and that by reason of its being unable to sell or having on sale the said Old Dutch Cleanser, a large number of persons who have heretofore been its customers have sent their

orders for other goods which plaintiff sells to other wholesale grocers and that by reason of the said action of said defendant, the said plaintiff is deprived not only of the ordinary profits which it would have derived from the sale of said staple articles, but has lost numerous customers and large profits on other goods which he would have sold to said customers.

Plaintiff further says that it is unable to fill orders and demands of the said article, Old Dutch Cleanser, by reason of the said action of the said defendant and that by reason thereof it is greatly injured and damaged.

Plaintiff further says that it as wholesale grocer aforesaid believes that it is right and proper to furnish to all persons desiring to purchase of it all of the ordinary articles on sale in a wholesale grocery store at as reasonable price as same can be furnished and that for the reasons aforesaid if it purchased of the said defendant, the said Old Dutch Cleanser, under the agreement with the said defendant, it would have to sell it at a fixed and settled price when in truth and fact it can be sold at a price much less than that demanded by the said defendant and the seller thereof make a lawful and ordinary profit thereon.

(10) Plaintiff further says that if it enters into the agreement aforesaid with the said defendant aforesaid, it will violate the law. Plaintiff further says, that it, as is stated aforesaid, has a large established business and that it has been, is, and will in the future have to compete with those who are wholesale grocers engaged in the business of selling to retail grocers and other stores that sell goods similar thereto and that by reason thereof and of the said acts aforesaid, it has been, is, and still continues to be, greatly injured in its business and property by the said defendant, and it says there has accrued to it a right of action and damages by reason of said acts aforesaid, and plaintiff claims the sum of Thirty Thousand Dollars (\$30,000.00) and three-fold that amount, to-wit, Ninety Thousand Dollars (\$90,000.00) damages and costs of this suit, including a reasonable attorney's fee.

Wherefore plaintiff brings this suit and claims of the defendant the sum of Thirty Thousand Dollars (\$30,000.00) and three-fold that amount, to-wit, Ninety

Thousand Dollars (\$90,000.00) and costs of this suit, including a reasonable attorney's fee.

THIRD COUNT.

The plaintiff, Frey & Sen, Incorporated, a corporation, duly incorporated under the laws of the State of Maryland, sues the defendant, The Cudahy Packing Company, a corporation duly incorporated under and by virtue of the laws of the State of Illinois, and doing business and having an agent in the City of Baltimore, State of Maryland, and within the jurisdiction of this court, for that whereas, the plaintiff at and before the happening of the grievances hereinafter mentioned, was and still is engaged in the wholesale grocery business at the corner of Pratt and Commerce Streets, in the City of Baltimore, State of Maryland, within the jurisdiction of this court, and that being engaged in said business as aforesaid, the said plaintiff is proprietor of the said wholesale grocery store aforesaid, and sells (11) large quantities of groceries and kindred articles not only to the persons in the City of Baltimore, State of Maryland, but throughout the said State and throughout the states adjacent thereto, and in a number of states in the Southern part of the United States, and that among the articles sold in wholesale grocery stores is Old Dutch Cleanser, which is a powdered form of scouring compound and is used by a great number of people, and that prior to the grievances hereinafter mentioned, the said plaintiff sold in its said store aforesaid, large quantities of said Old Dutch Cleanser to the value of to-wit Fifteen Thousand Dollars (\$15,000.00) worth per year.

Plaintiff further says that among the wholesale grocers in the City of Baltimore, and among the wholesale grocers in the State of Maryland, and in the territory in which plaintiff sells his goods, great competition exists, and among other things sold by said wholesale grocers carrying on a business similar to that of plaintiff is the said Old Dutch Cleanser, which is a staple article and an article ordinarily sold in said wholesale grocery stores.

Plaintiff further says that the said defendant, The Cudahy Packing Company, is engaged in the City of Chicago, State of Illinois, in the manufacture of said

Old Dutch Cleanser, which said Old Dutch Cleanser is as stated aforesaid, a staple article and is sold generally throughout the United States, and all first-class grocers and other stores sell the said Old Dutch Cleanser, and the said defendant sells the said Old Dutch Cleanser to to all jobbers and wholesale grocers throughout the United States.

Plaintiff further says that although it, the said plaintiff, is engaged in the business as aforesaid, and although the said defendant knowing that fact, yet the said defendant notwithstanding that it is its duty to sell to said plaintiff at the same price that it sells to other persons similarly situated, and notwithstanding it is its duty not to discriminate against the said plaintiff, yet the said defendant well knowing the premises, and (12) well knowing the duty aforesaid, has and does discriminate in price between different purchasers of commodities, and has and does sell the said commodity known as Old Dutch Cleanser to persons similarly situated as said plaintiff at a price less than it offers to sell same to said plaintiff, thereby creating and intending to create by said discrimination a monopoly in the sale of the said Old Dutch Cleanser, and intending thereby by reason of the said acts aforesaid, to prevent said plaintiff from selling said Old Dutch Cleanser to its customers at a price to be fixed by the said plaintiff and not by the said defendant, the said defendant attempts by said acts aforesaid to create a monopoly in the sale of the said Old Dutch Cleanser, and to fix the price on any sale or resale thereof.

And plaintiff says that on to-wit, the 12th day of March, 1915, and before and since that time the said defendant has refused to sell to the said plaintiff, the said Old Dutch Cleanser, at a price sold by the said defendant to persons similarly situated as the said plaintiff, but demands and demanded of said plaintiff an exorbitant and prohibitive price therefor, it being the object of the said defendant to prevent the said plaintiff from purchasing said Old Dutch Cleanser at a price that it can sell the same at a reasonable price to retail grocers and other persons purchasing the same.

Plaintiff further says that the further object of said refusal is in order to monopolize the said trade in the sale of said Old Dutch Cleanser, and plaintiff says that by reason of said unlawful acts of the said defendant,

and being entitled under the law to have to right to purchase the said Old Dutch Cleanser at a price sold by the said defendant to persons similarly situated, it is greatly damaged in and about its business and it having to compete with other wholesale grocers engaged in the business of selling to retail grocers and other stores that sell goods similar thereto, and that by reason thereof, (13) of the said acts aforesaid, plaintiff has been, is, and still continues to be greatly injured in its business and property by the said defendant, and it says that there has accrued to it a right of action and damages, by reason of the said acts aforesaid, and plaintiff claims the sum of Thirty Thousand Dollars (\$30,000.00) and three-fold that amount, to-wit, Ninety Thousand Dollars (\$90,000.00) damages and costs of this suit, including a reasonable attorney's fee.

Wherefore plaintiff brings this suit and claims of the defendant the sum of Thirty Thousand Dollars (\$30,000.00) and three-fold that amount, to-wit, Ninety Thousand Dollars (\$90,000.00), and costs of this suit, including a reasonable attorney's fee.

FOURTH COUNT.

The plaintiff, Frey & Son, Incorporated, a corporation duly incorporated under the laws of the State of Maryland, sues the defendant, The Cudahy Packing Company, a corporation duly incorporated under and by virtue of the laws of the State of Illinois, and doing business and having an agent in the City of Baltimore, State of Maryland, and within the jurisdiction of this court, for that whereas the plaintiff at and before the happening of the grievances hereinafter mentioned, was and still is engaged in the wholesale grocery business at the corner of Pratt and Commerce Streets, in the City of Baltimore, State of Maryland, within the jurisdiction of this court, and being engaged in said business aforesaid, the said plaintiff is proprietor of the wholesale grocery store aforesaid, and sells large quantities of groceries and kindred articles not only to the persons in the City of Baltimore, State of Maryland, but throughout the said State and throughout the States adjacent thereto, and in a number of States in the Southern part of the United States, and that among the articles sold in said wholesale grocery stores is Old Dutch

(14) Cleanser which is a powdered form of scouring compound and is used by a great number of people, and that prior to the grievances hereinafter mentioned, the said plaintiff, sold in his said store aforesaid large quantities of said Old Dutch Cleanser to the value of to-wit, Fifteen Thousand Dollars (\$15,000.00) worth per year.

Plaintiff further says that among the wholesale grocers in the City of Baltimore, and among the wholesale grocers in the State of Maryland, and in the territory in which plaintiff sells his goods, great competition exists, and among other things sold by said wholesale grocers carrying on a business similar to that of plaintiff is the said Old Dutch Cleanser, which is a staple article, and an article ordinarily sold in said wholesale grocery store.

Plaintiff further says that the said defendant, The Cudahy Packing Company, is engaged in the City of Chicago, State of Illinois, in the manufacture of said Old Dutch Cleanser, which said Old Dutch Cleanser is as stated aforesaid, a staple article and is sold generally throughout the United States, and all first-class grocers and other stores sell the said Old Dutch Cleanser, and the said defendant sells the said Old Dutch Cleanser to all jobbers and wholesale grocers throughout the United States.

Plaintiff further says that although it, the said plaintiff is engaged in said wholesale grocery business as aforesaid, and although the said defendant knowing that fact, yet the said defendant notwithstanding that it sells to other persons similarly situated, and notwithstanding it is its duty not to discriminate against the said plaintiff, yet the said defendant, well knowing the premises, and well knowing the duty aforesaid, has and does discriminate in price between different purchasers, and had and does sell the said commodity known as Old Dutch Cleanser to persons similarly situated as said plaintiff, but refuses to sell the same to said plaintiff, thereby creating and intending to create by said discrimination a monopoly in the sale of the said Old Dutch Cleanser, and intending thereby by reason of the said acts aforesaid to prevent the said plaintiff from selling said Old Dutch Cleanser to its customers at a price to be fixed by the said plaintiff and not by the said defendant, the said defendant attempting by the said

acts aforesaid to create a monopoly in the sale of the said Old Dutch Cleanser, and to fix the price on any sale or resale thereof, so that so far as the wholesaler is concerned the said price to the said wholesale shall be fixed, and plaintiff says that on the 12th day of March, 1915, and before and since that time, the said defendant has refused to sell to the said plaintiff, the said Old Dutch Cleanser, although the said defendant sells to other wholesale grocers similarly situated, that the said object of the said refusal is in order to monopolize the said trade in the sale of the said Old Dutch Cleanser, and to compel the purchaser thereof to pay a certain and fixed price therefor, and plaintiff says by reason of said unlawful acts of the said defendant, and by reason of the fact that it is entitled under the law to have a right to purchase the said Old Dutch Cleanser, at a price sold by the said defendant to persons similarly situated, it is greatly damaged in and about its business as a wholesale grocer, and that it cannot, as it lawfully has a right to have said Old Dutch Cleanser on sale in its store aforesaid, and by reason of the acts aforesaid it has not only lost the sale and the profit that would otherwise have accrued to it by the sale of said Old Dutch Cleanser aforesaid, but being unable to furnish the same to customers when they ordered the same, with other goods, it has lost a great number of customers, and that by reason of the acts aforesaid, it is and has been, and still continues to be greatly injured and damaged in its business by the said action of the said defendant, and it says that there has accrued to it a right of action and damages, by reason of the said acts aforesaid, and plaintiff claims the sum of Thirty Thousand Dollars (\$30,000.00) and three-fold (16) that amount, to-wit, Ninety Thousand Dollars (\$90,000.00) damages and cost of this suit, including a reasonable attorney's fee.

Wherefore plaintiff brings this suit and claims of the defendant the sum of Thirty Thousand Dollars (\$30,000.00) and three-fold that amount, to-wit, Ninety Thousand Dollars (\$90,000.00) and costs of this suit, including a reasonable attorney's fee.

DANIEL W. BAKER,
HORACE T. SMITH,
Attorneys for Plaintiff.

**DEMURRER TO THIRD AND FOURTH COUNTS OF
PLAINTIFF'S DECLARATION.**

(17) Filed April 7, 1916.

The Defendant, Cudahy Packing Company, by Gilbert H. Montague and Washington Bowie, Jr., its Attorneys, for demurrer to the third count in the Plaintiff's Declaration says that the said third count is bad in substance in that under the Acts of Congress, in such cases made and provided, the jurisdiction of the acts complained of herein was, and is, committed unto the Federal Trade Commission, and it does not aver that the jurisdiction of the Federal Trade Commission has been invoked or exercised.

And for demurrer to the fourth count in the Plaintiff's Declaration says that the said fourth count is bad in substance in that under the Acts of Congress, in such cases made and provided, the jurisdiction of the acts complained of herein was, and is, committed unto the Federal Trade Commission, and it does not aver that the jurisdiction of the Federal Trade Commission has been invoked or exercised.

GILBERT H. MONTAGUE,
WASHINGTON BOWIE, JR.,
Attorneys for Defendant.

**OPINION OF THE COURT IN RULING ON DEMURRER
TO DECLARATION.**

(18) Filed April 27, 1916.

ROSE, District Judge:

The plaintiff and the defendant are both corporations, one of Maryland, the other of Illinois.

The plaintiff's declaration contains four counts. It charges that the defendant has violated the Sherman and the Clayton Acts to its injury, and asks damages therefore.

The third and fourth counts allege in substance that the defendant is a manufacturer of an article known as "Old Dutch Cleanser." The plaintiff, a wholesale grocer, had a trade in it of \$15,000 a year in Maryland.

The defendant, because plaintiff would not allow defendant to control its re-sale prices, refused to sell plaintiff at the same price at which it sold all other persons similarly situated, but asked it an exorbitant and prohibitive price. Defendant entered a demurrer to these counts of the declaration. It says that under the Clayton Act the Courts have no jurisdiction of suits brought to recover for price discriminations, until after the Federal Trade Commission has determined that there was such discrimination. By analogy it relies upon case of *Texas and Pacific Railway Company vs. Abilene Cotton Oil Company*, 204 U. S. 426, and the cases which have followed it.

It is unnecessary in this case to determine whether (19) the law laid down in these decisions is or is not ever applicable to price discrimination forbidden by the Clayton Act. The facts alleged make a case analogous to that of the *Pennsylvania Railroad Company vs. International Coal Company*, 220 U. S. 184, in which it was held that the Courts had jurisdiction to award damages for the discrimination therein set up although the Interstate Commerce Commission had not acted or been asked to act.

The demurrer will be overruled.

ORDER OF COURT OVERRULING DEMURRER TO THIRD AND FOURTH COUNTS OF DECLARATION.

(20) Filed June 1, 1916.

The defendant having, on April 7th, 1916, filed a demurrer to the third and fourth counts of the declaration in the above entitled cause, the Court heard counsel for the respective parties, and being of opinion that said demurrer should be overruled, for the reasons embodied in the opinion filed in the cause on April 27th, 1916; thereupon it is

Ordered, this first day of June, 1916, by the District Court of the United States for the District of Maryland, that the said demurrer of the defendant be and is hereby overruled.

JOHN C. ROSE,
District Judge.

DEMURRER TO DECLARATION.

(21)

Filed June 7, 1916.

The defendant, the Cudahy Packing Company, leave of Court first being had and obtained; by Gilbert H. Montague and Washington Bowie, Jr., its attorneys, for demurrer to the first count of the declaration says that said count is bad in substance and insufficient in law in that the refusal to sell under the circumstances alleged in said count, do not constitute a violation of the statute in such case made and provided.

And for demurrer to the second count of the declaration says that said count is bad in substance and insufficient in law in that the refusal to sell, and demand of an exorbitant and prohibitive price, under the circumstances alleged in said count, do not constitute a violation of the statute in such case made and provided.

And for demurrer to the third count of the declaration says that said count is bad in substance and insufficient in law in that the refusal to sell, and demand of an exorbitant and prohibitive price, and offer to sell, and discrimination and monopoly, under the circumstances alleged in said count, do not constitute a violation of the statute in such case made and provided.

(22) And for demurrer to the fourth count of the declaration says that said count is bad in substance and insufficient in law in that the refusal to sell, and discrimination, and monopoly, under the circumstances alleged in said count, do not constitute a violation of the statute in such case made and provided.

GILBERT H. MONTAGUE,
WASHINGTON BOWIE, JR.,
Attorneys for Defendant.

ORDER OF COURT OVERRULING DEMURRER TO DECLARATION.

(23)

Filed June 7, 1916.

The defendant, having on June 7th, 1916, filed a demurrer to each count of the declaration in the above entitled case, the said demurrer came on for hearing, counsel for the respective parties were heard by the Court.

and the Court being of opinion that said demurrer should be overruled; it is therefore,

Ordered, this 7th day of June, 1916, by the District Court of the United States for the District of Maryland, that the aforesaid demurrer be and is hereby overruled, without prejudice to the right of the defendant to raise the same objections by prayers at the trial of such case.

JOHN C. ROSE,
District Judge.

DEFENDANT'S DEMAND FOR BILL OF PARTICULARS

(24) Filed June 7, 1916.

The defendant in the above entitled cause demands of the plaintiff a bill of particulars of the plaintiff's claim in the said cause stating:

1. At what times other than February 4, 1914, and March 12, 1915, the defendant refused to sell to the plaintiff.

2. Where, through whom, and under what circumstances the defendant refused to sell to the plaintiff.

3. When, where, through whom, and under what circumstances the defendant made or attempted to make any alleged resale contract or contracts with the plaintiff.

4. The names and addresses of the jobbers, wholesale grocers and grocers with whom the defendant made any alleged resale contract or contracts.

5. Whether such alleged resale contract or contracts with jobbers, grocers and wholesale grocers were oral or written.

6. When, where, through whom, and by what acts the defendant has tried to prevent jobbers, grocers and wholesale grocers from selling to the plaintiff, and the names and addresses of such jobbers, grocers and wholesale grocers.

(25) 7. The names and addresses of and the number of

persons previously customers of the plaintiff who have gone to other grocers or wholesale grocers for goods other than Old Dutch Cleanser because of defendant's alleged acts preventing plaintiff from selling Old Dutch Cleanser.

8. The amount of profits on Old Dutch Cleanser lost to the plaintiff because of the defendant's alleged acts, and the amount of profits on other goods, the sale of which is alleged to have been prevented by the said acts.

9. At how much less than the defendant's prices to retailers Old Dutch Cleanser can be sold at a fair profit, and at what price the plaintiff sold Old Dutch Cleanser to retailers.

10. In what manner and to what extent the plaintiff was damaged in and about its business as a wholesale grocer by defendant's alleged refusal to sell to the plaintiff, giving specific instances of such damage.

11. Upon what statute or statutes each count is based, giving this information separately for each count.

GILBERT H. MONTAGUE,
WASHINGTON BOWIE, JR.,
Attorneys for Defendant.

**PLAINTIFF'S EXCEPTION AND MOTION IN OPPOSITION
TO DEFENDANT'S DEMAND FOR BILL OF
PARTICULARS.**

(26)

Filed June 10, 1916.

The plaintiff says that the defendant cannot require a bill of particulars of the plaintiff's claim in said cause stating the matters, or any of them, set forth in the defendant's demand filed herein on the 7th day of June, 1916; and the plaintiff excepts to the defendant's said demand for a bill of particulars, and to each separate paragraph of said demand, and moves the Court not to receive but to strike from the files or dismiss the defendant's said demand, and each separate paragraph thereof, for the reasons following:

First: The plaintiff's declaration in said cause contains a plain statement of the facts necessary to constitute a ground of action, and is, therefore, sufficient under the first paragraph of Rule 22 adopted on December 27th, 1909, by the Circuit Court of the United States for the District of Maryland, and now a rule of the District Court of the United States for the District of Maryland by adoption on January 28th, 1913.

Second: The plaintiff's declaration in said cause is not so general as not to disclose the particulars to be offered in support of it, within the meaning and effect of the second paragraph of the aforesaid Rule 22.

(27) Third: The plaintiff's declaration in said cause does disclose the particulars of the plaintiff's demand, within the meaning and effect of the third paragraph of the aforesaid Rule 22.

Fourth: The plaintiff's declaration is not so general as not to give sufficient notice to the defendant of the evidence to be offered in support of it, within the meaning and effect of Maryland Code of Public Civil Laws (1911), Article 75, section 24, sub-section 107.

Fifth: The plaintiff's declaration in said cause contains a sufficient statement of facts necessary to constitute a ground of action under the anti-trust laws of the United States of America, comprising:

The Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2nd, 1890;

Sections 73 to 77, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," of August 27th, 1894;

The Act entitled "An Act to amend sections 73 and 76 of the Act of August 27th, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved February 12th, 1913;

The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15th, 1914.

Sixth: The particulars demanded in many para-

graphs of the defendant's said demand are obviously more within the direct knowledge of the defendant than of the plaintiff.

Seventh: The plaintiff's declaration in said cause constitutes an action *ex delicto* and the defendant in an action *ex delicto* is not entitled to demand or require a bill of particulars of the plaintiff's claim under the declaration

(28) Eighth: The defendant is not entitled to demand or require a bill of particulars of the plaintiff's claim under a declaration filed in an action brought under the aforesaid anti-trust laws of the United States of America, or any of them.

Ninth: The defendant obviously is demanding and attempting to require the plaintiff, before plea filed or issue joined, to produce a large volume of facts which the plaintiff is not required or ready to produce until the trial of said cause, and then may have to produce largely through testimony of the defendant's agents, contracts and records, or otherwise by the testimony of persons who are not agents of the plaintiff, nor answerable to it except through process of law for compelling the attendance and testimony of witnesses.

Tenth: The defendant seeks by the demand to require the plaintiff to disclose the names of its witnesses in a bill of particulars; but the plaintiff says that it is not required to file a bill of particulars in said cause disclosing the names of its witnesses.

Eleventh: The plaintiff's declaration in said cause constitutes an action *ex delicto*; the declaration is good in substance, and it gives sufficient notice to the defendant of the real character, nature and scope of the cause of action as to enable the defendant to prepare to meet it.

Twelfth: The defendant's said demand for a bill of particulars is not in the form sanctioned or required by the laws of the United States or the State of Maryland, nor by the custom, practice or rules prevailing in the District Court of the United States for the District of Maryland or the Courts of the State of Maryland.

Thirteenth: And for other reasons to be assigned at the hearing.

HORACE T. SMITH,
Attorney for Plaintiff.

ORDER OF COURT DISALLOWING DEFENDANT'S DEMAND FOR A BILL OF PARTICULARS.

(29) Filed June 26, 1916.

The defendant having, on June 7th, 1916, filed a demand for a bill of particulars of the plaintiff's claim in the said cause stating the matters set forth in said demand; and the plaintiff having, on June 10th, 1916, filed an exception and motion in opposition to the defendant's said demand, the Court heard counsel for the respective parties, and being of opinion that said demand should be disallowed; thereupon it is

Ordered, this 26th day of June, 1916, by the District Court of the United States for the District of Maryland, that the said exception and motion of the plaintiff be and hereby is sustained, and that the said demand of the defendant be and hereby is disallowed.

JOHN C. ROSE,
District Judge.

PLEA.

(30) Filed June 28, 1916.

The Defendant, Cudahy Packing Company, by Gilbert H. Montague and Washington Bowie, Jr., its Attorneys, for plea says that it did not commit the wrong alleged.

GILBERT H. MONTAGUE,
WASHINGTON BOWIE, JR.,
Attorneys for Defendant.

DOCKET ENTRY.

(31) June 28, 1917, Plea "did not commit the wrong alleged" filed.

(Service admitted.) Issue joined.

(32) Whereupon for trying the issues aforesaid above joined between the parties aforesaid, it is ordered by the court here that eighteen persons from the panel of petit jurors drawn and returned to the court here, in accordance with the statute in such case made and provided, be drawn by ballot; and thereupon the eighteen persons being so drawn by ballow, and written upon two lists, one of which lists is delivered to the counsel for the respective parties, and the counsel of each of said parties having stricken out three names from the said lists, thereupon the remaining twelve persons being called, come, that is to say:

Harry Rochester.	Harry Weber,
John R. Hugg.	Antone Petry,
Arthur M. McElroy.	Philip C. Baer,
John S. Bamberger.	George R. Morris,
L. Carroll Melvin.	LeRoy S. Zittle,
James R. M. Adams,	John A. Bishop,

who being empannelled and sworn to say the truth in the premises, and upon their oath do say, that they find for the plaintiff and assess the damages of said plaintiff for the first period to the date of suit at Two Thousand, One Hundred and Thirty-Nine Dollars, and for the second period from the date of suit to date at Three Thousand, Three Hundred and Seventy-Five Dollars, making a total of Five Thousand, Five Hundred and Fourteen Dollars.

MOTION FOR A NEW TRIAL AND IN ARREST OF JUDGMENT.

(33) Filed May 25, 1917.

To the Honorable John C. Rose, Judge of the District Court of the United States for the District of Maryland:

The Defendant in the above entitled cause, by its counsel, moves the Court to set aside the verdict of the jury and to grant it a new trial upon the issues joined in said cause for the following reasons:

1. Because the verdict is against the evidence;
 2. Because the verdict is against the weight of the evidence;
 3. Because the damages awarded are excessive.
- And as in duty bound, etc.

GILBERT H. MONTAGUE
WASHINGTON BOWIE, JR.
Attorneys for the Defendant.

**OPINION OF THE COURT ON MOTION IN ARREST OF
JUDGMENT.**

(34) Filed June 21, 1917.

IN THE DISTRICT COURT OF THE UNITED STATES,
DISTRICT OF MARYLAND.

Frey and Son, Incorporated, Plaintiff,

vs.

Cudaby Packing Company, a corporation, Defendant.

ROSE, District Judge:

The defendant objects to the entering of the judgment upon so much of the verdict of the jury in this case as ascertained the damages suffered by plaintiff subsequent to the date of the filing of the suit.

In the nature of things there is no reason why a jury should not be allowed to ascertain and award the damages suffered by plaintiff down to the time of trial, from wrongful acts of the same nature as those mentioned in the declaration. If such were the law there would doubtless some times be difficulty in applying it, but on the whole much trouble and expense would be saved.

The general rule is to the contrary. Perhaps because when it was first formulated the Judges were interested in the fees paid to the Chancery for the writs, and they did not care to furnish for the price of one, the justice that from their point of view should be paid for by the suing out of two or more. However this may be, it has long been established that the plain-

tiff can recover only for such damages as were the consequences of what the defendant did before suit was brought, although it is immaterial whether the effect of (35) what was done showed itself before or after the bringing of the suit. As for example: where the thing complained of is a tortious injury to the person or property from some particular act, the plaintiff may recover for any damage which manifests itself up to the time of the verdict. On the other hand, where the injury sued for is caused by a mere repetition or continuation of the acts of the same class as that for which the suit was brought, the plaintiff's recovery is limited to the damages resulting from such of these acts as were done before the bringing of the suit.

In *Loewe vs. Lamlor*, 235 U. S. 536, the plaintiff was allowed to recover for the damages done to it by a secondary boycott instigated by the defendant before the bringing of the suit, although some of the injury did not manifest itself until afterwards, but the authorities cited by the Supreme Court in support of its conclusion do not justify the assumption that it intended to modify the previously recognized principles of law.

In this case the only damage proved by the plaintiff was the loss of profits it would have made on re-sales of Old Dutch Cleanser if it had been able to buy Old Dutch Cleanser at the price at which other jobbers could obtain it. Such damage is a damage which occurs from day to day, and the damage on one day is not the necessary result of an act done by the defendant at an earlier date. The difference between cases in which the jury can give damages down to the date of the verdict and those in which it cannot may be illustrated thus: if the defendant had made some false and libelous statement against the plaintiff which acquired general circulation, the damage from that false and libelous statement might well have continued long after the bringing of the suit, and long after defendant ceased to be in business at all. On the other hand, if the defendant in the case at bar had wound up its affairs the day after the suit was brought, no one would contend that plaintiff was entitled to recover damages caused by the refusal of defendant to sell its goods after that date, or to permit other persons so to do, because both the motive and the power to enforce such refusal or restraint ceased with the defendant's going out of business.

I wish the law was otherwise, but as it is I shall be compelled to set aside so much of the verdict as awards the plaintiff damages from the time of the institution of the suit to the verdict. Judgment in plaintiff's favor will be entered upon the balance of the verdict.

ORDER OF COURT SUSTAINING DEFENDANT'S OBJECTION TO PART OF VERDICT.

(37) Filed June 22, 1917.

U. S. DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

Frey & Son, Incorporated,	}	At Law No. 274.
<i>vs.</i>		
The Cudahy Packing Co.		

The defendant's objection to entering judgment in this case upon so much of the verdict of the jury as awards to the plaintiff the sum of \$3,375.00 for damages from the time of the institution of this suit until the time of verdict, coming on for hearing, counsel for the respective parties were heard, and the Court being of opinion that the said objection shall be sustained; it is therefore, this 22 day of June, 1917, ordered by the District Court of the United States for the District of Maryland, that the said objection be and it is hereby sustained, and so much of the verdict of the jury as awards to the plaintiff the sum of \$3,375.00 for damages from the time of the institution of this suit until the time of verdict, be and the same hereby is set aside.

JOHN C. ROSE,
District Judge.

ORDER OF COURT OVERRULING MOTION FOR NEW

(38) Filed June 22, 1917.

TRIAL.

The defendant's motion for a new trial in this case coming on for hearing, counsel for the respective parties were heard, and the Court being of opinion that the said motion should be overruled; it is therefore, this 22 day of June, 1917, ordered by the District Court of the

United States for the District of Maryland, that the said motion be and it is hereby overruled, and the Clerk of this Court is directed to enter judgment in favor of the plaintiff and against the defendant on the verdict of the jury for the damages assessed by the jury as sustained by the plaintiff up to the time this suit was instituted, with the costs of the suit, including a reasonable attorney's fee fixed and allowed to the plaintiff by the Court in the sum of twelve hundred and fifty dollars.

JOHN C. ROSE,
District Judge.

(39) Therefore it is considered by the Court here, that the said plaintiff recover against the said defendant, as well the said sum of Two Thousand, One Hundred and Thirty Nine Dollars damages as aforesaid, as the sum of Three Hundred, Fifty-Eight Dollars and nine cents, adjudged by the Court here unto the said plaintiff for its costs and charges about its suit in its behalf expended, and the sum of Twelve Hundred and Fifty Dollars, adjudged by the Court here unto the said plaintiff as a reasonable counsel fee, and the defendant in mercy, and that the said plaintiff have hereof its execution, etc.

MEMORANDUM.

Verdict was rendered in the above entitled case on the 25th day of May, 1917, and judgment entered on said verdict on the 22nd day of June, 1917.

AMENDED DECLARATION.

(40) Filed by Leave of Court in Open Court May 25, 1917.

AMENDED DECLARATION.

FIRST COUNT.

The plaintiff, Frey & Son, Incorporated, a corporation duly incorporated under the laws of the State of Maryland, sues the defendant, The Cudahy Packing Company, a corporation duly incorporated under and by vir-

tue of the laws of the State of Illinois, and doing business and having an agent in the City of Baltimore, State of Maryland, and within the jurisdiction of this court, for that whereas, the plaintiff at and before the happening of the grievances hereinafter mentioned, was and still is, engaged in the wholesale grocery business at the corner of Pratt and Commerce Streets, in the City of Baltimore, State of Maryland, within the jurisdiction of this court, and being engaged in said business aforesaid, the said plaintiff is proprietor of the said wholesale grocery store aforesaid, and sells large quantities of groceries and kindred articles not only to the persons in the City of Baltimore, State of Maryland, but throughout the said State and throughout the States adjacent thereto, and in a number of States in the Southern part of the United States, and that among the articles sold in wholesale grocery stores is Old Dutch Cleanser, the same being powdered form of scouring compound and is used by a great number of people, and that prior to the grievances hereinafter mentioned, the said plaintiff purchased from the said defendant and sold in its said store aforesaid, large quantities of the said Old Dutch Cleanser, to the value, of, to-wit, Fifteen Thousand Dollars worth per year.

Plaintiff further says that among the wholesale grocers in the City of Baltimore, and among the wholesale grocers in the State of Maryland, and in the territory in which plaintiff sells his goods, great competition generally exists, and among other things sold by said wholesale grocers carrying on a business similar to that of plaintiff is the said Old Dutch Cleanser, which is a staple article, and an article ordinarily sold in said wholesale grocery stores.

Plaintiff further says that the defendant, The Cudahy Packing Company, is and has been for many years engaged in the City of Chicago, State of Illinois, in the manufacture of said Old Dutch Cleanser, which said Old Dutch Cleanser is as stated aforesaid, a staple article and is sold generally throughout the United States, and nearly all grocers sell the said Old Dutch Cleanser, and the said defendant has and does sell the said Old Dutch Cleanser, to nearly all jobbers and wholesale grocers throughout the United States.

Plaintiff further says that the said defendant, the said corporation aforesaid, has and for many years has

had, and understanding and agreement with most of the jobbers, wholesale grocers, and other grocers throughout the United States, by which understanding and agreement it has and does sell to said jobbers, wholesale grocers and other grocers said Old Dutch Cleanser upon the understanding and agreement that they, the said jobbers, wholesale grocers and other grocers will sell said Old Dutch Cleanser for certain fixed prices to the retail trade, and that the said understanding and agreement aforesaid requires of the said jobbers and (42) the said wholesale grocers that they will not to sell to retailers unless they sell at a certain specific price and in the said understanding and agreement with the said jobbers and wholesalers, said defendant requires that they sell the said Old Dutch Cleanser at a fixed and certain price to be determined by the said defendant and not by the said jobbers, wholesale grocers and other grocers who purchase the said Old Dutch Cleanser; and by said agreement and understanding the defendant prevents the plaintiff from buying Old Dutch Cleanser from the other jobbers and wholesale grocers; and prevents said jobbers and wholesalers from selling said Old Dutch Cleanser to the plaintiff.

Plaintiff further says that the said understanding and agreement aforesaid was and is in restraint of trade and is null and void in that it limits and restrains the sale of said Old Dutch Cleanser after the said defendant has parted with its title thereto, and plaintiff refusing to be a party to such agreement and understanding is not permitted to purchase the same from the defendant, and by reason thereof is prevented and hindered in its business, and is prevented and hindered from having the said Old Dutch Cleanser in stock in its store in order that it may sell the same to grocers and other persons throughout the State of Maryland and other States.

(43) Plaintiff further says that the said defendant aforesaid, to-wit, on the fourth day of February, 1914, and at divers times before and since that time, has refused to sell to the said plaintiff said Old Dutch Cleanser unless the said plaintiff would enter into the agreement and understanding aforesaid; and the said plaintiff further says that the said defendant, by the agreement and understanding aforesaid has prevented plaintiff from buying the said Old Dutch Cleanser from other jobbers

and wholesale grocers; and that although said Old Dutch Cleanser is a staple article as stated aforesaid and should be on sale in the store of the said plaintiff in order that it may sell it to other grocers and persons using the same, the said plaintiff is unable to obtain the same unless it enters into an agreement and understanding with the said defendant, that it as a wholesaler will sell the Old Dutch Cleanser at a price fixed by the said defendant.

Plaintiff further says that it has refused to enter into said understanding and agreement because the same is unlawful and in restraint of trade, and by not having the said Old Dutch Cleanser on sale in its store aforesaid, the said plaintiff is deprived of a large number of customers, and that by not having the said Old Dutch Cleanser on sale in its store as aforesaid, it is unable to (44) fill numerous orders and demands for the said Old Dutch Cleanser, which orders and demands are made daily upon it by customers and other persons to whom it sells; and that by reason of its being unable to sell or having on sale the said Old Dutch Cleanser, the said plaintiff is deprived of the ordinary profits which it would have derived from the sale of said staple article, Old Dutch Cleanser.

Plaintiff further says that it is unable to fill orders and demands for the said article, Old Dutch Cleanser, by reason of the said action of the said defendant, and that by reason thereof it is greatly injured and damaged.

Plaintiff further says that it, as is stated aforesaid, has a large established business and that it has been, is, and will in the future have to compete with those who are wholesale grocers engaged in the business of selling to retail grocers and other stores that sell goods similar thereto and that by reason thereof and of the said acts aforesaid, it has been, is, and still continues to be greatly injured in its business and property by the said defendant, and it says that there has accrued to it a right of action and damages by reason of the said acts aforesaid, the plaintiff claims the sum of Thirty Thousand Dollars (\$30,000.00) and three-fold that amount, to-wit, Ninety Thousand Dollars (\$90,000.00) damages and costs of this suit; including a reasonable attorney's fee.

Wherefore plaintiff brings this suit and claims of the defendant the sum of Thirty Thousand Dollars (\$30,-

(900.00) and three-fold that amount, to-wit, Ninety Thousand Dollars (\$90,000.00) and costs of this suit, including also a reasonable attorney's fee.

SECOND COUNT.

The plaintiff, Frey & Son, Incorporated, a corporation duly incorporated under the laws of the State of Maryland, sues the defendant, The Cudahy Packing Company, a corporation duly incorporated under and by (45) virtue of the laws of the State of Illinois, and doing business and having an agent in the City of Baltimore, State of Maryland, and within the jurisdiction of this court, for that whereas the plaintiff at and before the happening of the grievances hereinafter mentioned was, and still is, engaged in the wholesale grocery business at the corner of Pratt and Commerce Streets, in the City of Baltimore, State of Maryland, within the jurisdiction of this court, and being engaged in said business aforesaid, the said plaintiff is proprietor of the wholesale grocery store aforesaid, and sells large quantities of groceries and kindred articles not only to the persons in the City of Baltimore, State of Maryland, but throughout the said State and throughout the States adjacent thereto, and in a number of States in the Southern part of the United States; and that among the articles sold in said wholesale grocery stores is Old Dutch Cleanser, which is a powdered form of scouring compound and is used by a great number of people, and that prior to the grievances hereinafter mentioned, the said plaintiff purchased from the said defendant and sold in its said store aforesaid large quantities of said Old Dutch Cleanser to the value of, to-wit, Fifteen Thousand Dollars (\$15,000.00) worth per year.

Plaintiff further says that among the wholesale grocers in the City of Baltimore, and among the wholesale grocers in the State of Maryland and in the territory in which plaintiff sells its goods, great competition generally exists, and among other things sold by said wholesale grocers carrying on a business similar to that of plaintiff is the said Old Dutch Cleanser which is a staple article, and an article ordinarily sold in said wholesale grocery stores.

Plaintiff further says that the said defendant, The Cudahy Packing Company, is and has been for many

years, engaged in the City of Chicago, State of Illinois, in the manufacture of said Old Dutch Cleanser, which said Old Dutch Cleanser is as stated aforesaid, a staple article and is sold generally throughout the United (46) States, and nearly all grocers and other stores sell the said Old Dutch Cleanser, and the said defendant has and does sell the said Old Dutch Cleanser to nearly all jobbers and wholesale grocers throughout the United States, for the purpose of being used, consumed and resold within the United States.

Plaintiff further says that the defendant has, and for many years has had, an understanding and agreement with most of the jobbers, wholesale grocers, and other grocers throughout the United States, by which understanding and agreement it has and does sell to said jobbers, wholesale grocers and other grocers said Old Dutch Cleanser upon the understanding and agreement that they, the said jobbers, wholesale grocers and other grocers will sell said Old Dutch Cleanser for certain fixed prices to the retail trade, and that the said understanding and agreement requires of the said jobbers and the said wholesale grocers that they will not sell to retailers unless they sell at a certain specific price, and in the said understanding and agreement with the said jobbers and wholesalers, said defendant requires that they sell the said Old Dutch Cleanser at a fixed and certain price to be determined by the said defendant, and not by the said jobbers, wholesale grocers and other grocers who purchase the said Old Dutch Cleanser. And the said plaintiff further says that the said defendant, by the agreement and understanding aforesaid, prevents the plaintiff from buying the said Old Dutch Cleanser from the other jobbers and wholesale grocers; and prevents said jobbers and wholesale grocers from selling the said Old Dutch Cleanser to the plaintiff.

And the plaintiff says that on the 12th day of March, 1915, and before and since that time, the defendant, in the course of its said business, has sold certain quantities of the said Old Dutch Cleanser at a certain price to wholesale grocers in the City of Baltimore, being persons similarly situated as the plaintiff, and has refused to sell like quantities of the said Old Dutch Cleanser to the plaintiff at that price, but the defendant demanded (47) and required that the plaintiff pay a much higher price therefor; the defendant thereby controlling and

intending to control the sale of the said Old Dutch Cleanser by the wholesale grocers to the retail grocers within the United States, and to control the price charged for said Old Dutch Cleanser when sold by the said wholesalers to the retailers, and thereby lessening competition among the said wholesale grocers with respect to the price charged for said Old Dutch Cleanser when sold by the wholesalers to the retailers; and the defendant also intending to compel and compelling the retailers to pay a certain fixed price for the said Old Dutch Cleanser which they purchased from the wholesalers, and preventing and intending to prevent the said plaintiff, by reason of the acts aforesaid, from buying and selling the said Old Dutch Cleanser.

And the plaintiff says that by reason of said unlawful act of the said defendant, it is, has been, and continues to be greatly injured and damaged in and about its business as a wholesale grocer; and by reason of the acts aforesaid it has lost the sale and the profit, and continues to lose the sale and the profit, which would otherwise have accrued to it by the buying and selling of said Old Dutch Cleanser aforesaid. And the plaintiff says that there has accrued to it a right of action and damages, by reason of the said acts aforesaid, and the plaintiff claims the sum of Thirty Thousand Dollars (\$30,000.00) and three-fold that amount, to-wit, Ninety Thousand Dollars (\$90,000.00) damages and costs of this suit, including a reasonable attorney's fee

Wherefore plaintiff brings this suit and claims of the defendant the sum of Thirty Thousand Dollars (\$30,000.00) and three-fold that amount, to-wit, Ninety Thousand Dollars (\$90,000.00) and costs of this suit, including a reasonable attorney's fee.

DANIEL W. BAKER,
HORACE T. SMITH,
Attorneys for Plaintiff.

PLEA TO AMENDED DECLARATION.

(48)

Filed May 25, 1917.

The Defendant, Cudahy Packing Company, by Gilbert H. Montague and Washington Bowie, Jr., its at-

torneys, for plea to the Amended Declaration says that it did not commit the wrong alleged.

GILBERT H. MONTAGUE,
WASHINGTON BOWIE, JR.,
Attorneys for Defendant.

DOCKET ENTRY.

(49) May 25, 1917, All pleadings to first declaration to be considered as being in as to Am. Declaration.

AGREEMENT OF COUNSEL AND ORDER OF COURT EXTENDING TIME FOR SIGNING AND SEALING BILLS OF EXCEPTION.

(50) Filed June 13, 1917.

It is Agreed in this case that the time for signing bills of exceptions shall be extended until July 31st, 1917, inclusive.

HORACE T. SMITH,
Attorney for Plaintiff.
WASHINGTON BOWIE, JR.,
Attorney for Defendant.

Ordered, by the District Court of the United States for the District of Maryland, this 13th day of June, 1917, that the time for signing bills of exceptions in the above entitled case be and the same is hereby extended until July 31st, 1917, inclusive.

JOHN C. ROSE,
U. S. District Judge.

ORDER OF COURT EXTENDING TIME FOR SIGNING AND SEALING BILLS OF EXCEPTION.

(51) Filed July 31, 1917.

The defendant, having presented its bill of exceptions to the Court on the morning of July 30th, and counsel for plaintiff and defendant now being engaged in revising said bill of exception before signature, it is ordered by the United States District Court this 31st day of July, 1917, that the time for allowing and signing

the bill of exceptions be, and it hereby is, extended for one day from this date.

JOHN C. ROSE, Judge.

**STIPULATION OF COUNSEL AND ORDER OF COURT
THEREON EXTENDING TIME FOR SIGNING AND
SEALING BILL OF EXCEPTIONS.**

(52)

Filed August 1, 1917.

Baltimore, August 1st, 1917.

It is stipulated and agreed by and between counsel for the plaintiff and defendant that the time for signing and allowing Bill of Exceptions in this case shall be further extended to and including the fifteenth day of August, 1917, and that the assignments of error, petition and order for writ of error and approved supersedeas bond, in the amount approved by the Court, to-wit, six thousand (\$6,000) dollars, shall be filed on or before August 20th, 1917.

HORACE T. SMITH,

Attorney for Plaintiff.

WASHINGTON BOWIE, Jr.,

Attorney for Defendant.

Upon the foregoing stipulation it is ordered by the District Court of the United States for the District of Maryland, this first day of August, 1917, that the time for signing and allowing the Bill of Exceptions in the above case, be and it is hereby extended until the 15th day of August, 1917, inclusive.

JOHN C. ROSE,

U. S. District Judge

BILL OF EXCEPTIONS.

(53)

Filed August 10, 1917.

PLAINTIFF'S BILL OF EXCEPTIONS.

The above entitled cause came on to be heard before

WALTER A. FREY.

his Honor, Judge John C. Rose, and a jury at ten o'clock a. m., Tuesday, May 22nd, 1917.

Present in behalf of the plaintiff, Messrs. Horace T. Smith and Daniel W. Baker.

Present in behalf of the defendant, Messrs. Washington Bowie and Gilbert H. Montague.

TESTIMONY ON BEHALF OF THE PLAINTIFF.

Preceding the taking of testimony counsel for the plaintiff in open court called the Court's attention to the fact that the deposition of Emil A. Strauss was taken in Chicago, and the same counsel then gave notice that he was going to move to suppress that deposition, when offered in evidence, on the ground that on the cross examination the witness refused to answer certain questions. The same counsel also stated that he (54) was giving this notice now to the other side so they would know it in plenty of time if they desired to bring the witness from Chicago here. The Court stated that he could only rule on that proposition when the testimony is offered.

(Letters produced by counsel for defendant upon call of counsel for plaintiff were offered in evidence and marked Plaintiff's Exhibits Nos. 1 to 20, inclusive.)

Thereupon—

WALTER A. FREY, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BAKER:

My full name is Walter A. Frey. I am President of the plaintiff, Frey & Son. The business of the Plaintiff is wholesale grocers. We are engaged in business at 400 East Pratt Street, and were engaged there in 1914. We have dealt with the defendant, the Cudahy Packing Company. We commenced to deal with the Cudahy Packing Company about 1905 or 1906. We continued to

deal with them until the latter part of January, 1914. The manner of our business dealings with defendant during three or four years prior to February, 1914, was: we bought Old Dutch Cleanser from them and other products that they sold in the regular course of our business and sent the orders sometimes to New York, if I can recall correctly, and at other times through their representative when he would be traveling through here from New York, and sometimes I think we would give them to their local field man. It would depend upon how fast we wanted the goods. If we knew they had stock here and we could get hold of their local man we would give it to him. They would render the invoice and we would pay them.

(55) Q. Where did you get the goods from? A. They were billed from the New York office. Whether they delivered them or whether they gave us an order on the warehouse to go and haul them in Baltimore here, I do not recall any more.

Q. In regard to your own business, just tell generally the character of your business. A. In 1914 we were doing the same as we are doing now, a city and out of town business. We sell goods entirely by catalogue through all the States along the Atlantic seaboard from Delaware down, including Delaware, Virginia, Maryland, West Virginia, the lower counties of Pennsylvania, North Carolina, South Carolina, Florida, and we have several customers in Ohio; we have several customers scattered out even at further points, in Georgia, but they are rare. In the city we do a strictly cash business, f. o. b. our warehouse, we have no salesmen out. We have two men out on the street in the capacity of missionaries, men who follow up missionary orders and get new orders filed. People haul the goods from our place and pay cash for them.

Mr. MONTAGUE: I object to this. It has no relevancy to this case. We are not interested in his method of doing business as that is not on trial here, and I submit that the witness has more than sufficiently answered the question within the issues of this case.

The COURT: I am inclined to think that it has a bearing on the question of the quantum of damage, and it is almost essential to bring out how he carries on his business for that reason.

WALTER A. FREY.

Mr. MONTAGUE: I wish to note an exception.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted and now prays (56) the Court to sign and seal this its first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: We send out catalogues to all the country trade. We have no salesmen at all in any way, shape or form, as publicity men or anything else in the country. We send a price card usually every week and a catalogue once a month. Recently we do not send them so frequently on account of the numerous changes in prices, but at that time we sent a price catalogue every month and a price card every week. Through the city we send out price cards at irregular intervals as the conditions of the business and the advantages that we have to offer in certain lines might necessitate our sending them. Back of the date of the bringing of this suit in 1915 and five years back we had catalogues, back that far we had catalogues. We did a credit business in the city and a catalogue business in the country until November 4, 1914. We have none of the catalogues mentioned in the notice of defendant on plaintiff to produce back of 1915. We do not keep them that long. We would not have them in our office for more than a year. They are absolutely no advantage to us and they take up space and gather dust.

Q. What is the volume of business that you do with States other than the State of Maryland?

Mr. MONTAGUE: I raise an objection to that question on the ground that to prove the volume of business requires proof of orders and sales which, by the answer given to our demand for proof, calls for books.

(57) The COURT: A man who runs his own business can certainly testify from his own knowledge and recollection what the amount of what business is. You may cross-examine him if you see fit, and require the pro-

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duction of his books, if you see fit, if you think that they will, in point of fact, do you any good and show that he is mistaken in his recollection, but it is not a question of contract where you have to have a certain character of strict proof. A man who says he knows the business that he has done can testify to it as a fact.

Mr. MONTAGUE: I concede that there may be cases in respect to a man's own business where that can be done, but this is a corporation and this witness is an officer of that corporation, and under those circumstances we do not think this can be proved in this way.

The Court: I am of the opinion that he can testify as to what the volume of his business is and you can cross-examine him as to how well founded that opinion is, and if you have reason to doubt it you can call for the production of the books.

Mr. MONTAGUE: I take an exception to your Honor's ruling.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its second bill of exceptions, which is accordingly done this 10 day of August, 1917.

JOHN C. ROSE, Judge. (Seal)

Q. What is the volume of business that you do with states other than the State of Maryland? A. I can not answer that question because our sales in Maryland outside of the City of Baltimore are included in our out of town sales as a whole. I can give the total volume of (58) our business and our city business as half of our business.

Q. And the other half is in Maryland and the adjacent states?

(Objected to; objection overruled; exception noted.)

A. Yes.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the plaintiff excepted, and now prays the Court to sign and seal this its third bill of

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exceptions, which is accordingly done this 10 day of August, 1917.

JOHN C. ROSE, Judge. (Seal)

The COURT: Who came to see you with reference to the Cudahy Packing Company's business?

Mr. MONTAGUE: So far as it may refer to anything else than Old Dutch Cleanser I object to it as immaterial.

The COURT: I understood the cause of action to be that they would not sell him because he would not maintain resale prices on Dutch Cleanser?

Mr. MONTAGUE: That is it.

The COURT: I will allow the plaintiff to show his dealings in other matters with the defendant to the extent and for the purpose of showing that it was not any objection to his credit that prevented the Cudahy Packing Company from selling him Old Dutch Cleanser. If the plaintiff can show that, he is entitled to do so, to show that the refusal to sell him the Dutch Cleanser was not because of any possible objection to his credit.

Mr. MONTAGUE: I note an exception to your Honor's ruling.

The COURT: The testimony is let in only to show that if they should sell him something else it could not (59) be that they did not want to deal with him at all.

Mr. MONTAGUE: I must very respectfully except to the statement your Honor made to the jury that if it should appear that the Cudahy Company had sold other things to Frey that that necessarily meant that Frey's credit, so far as we considered it, was good, because the conditions of the sale would be very different.

The COURT: I did not say "necessarily," I said that was one of the questions for the jury to pass upon. It is relevant for that purpose.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

WALTER A. FREY.

Q. I put the question to you about the business of the Cudahy Packing Company down to 1914; who represented the Cudahy Packing Company in the city of Baltimore three or four years back of 1914? Who called to see you from the Cudahy Packing Company? A. A number of representatives. Mr. Sonnehill, the Baltimore representative.

Mr. MONTAGUE: I object to a description of the representatives. If he will tell the names then we can check them up, but I object to his designating what they were.

The COURT: He said those coming to see him; among them was Mr. Sonnehill.

Mr. MONTAGUE: He said a number of representatives.

(60) The COURT: Who were they?

The WITNESS: During the whole period I can recall Mr. Sonnehill, Mr. Philip, Mr. Berry, Mr. Carson and Mr. Grace. They were all that were connected with the Old Dutch Cleanser Department, to the best of my recollection. We had representatives from the canned meat department, but I don't know their names.

Mr. MONTAGUE: I do not know most of these men, and when he says "representatives" it puts us at a disadvantage.

The WITNESS: One of them was Mr. Jones, I just recall that.

Mr. MONTAGUE: I move to strike out about the representatives.

The COURT: "Representatives" means nothing but drummers, I apprehend, to Mr. Frey. He says a number of drummers, in effect, called on him in the canned meat line and he recalls for the moment the name of one of them, Mr. Jones.

Mr. MONTAGUE: That is all right, I do not object to that.

Q. Who is Mr. Carson? A. Mr. Carson was in charge of the New York office.

Mr. MONTAGUE: Now I object to that unless the witness can say that he is so familiar with our own affairs

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as to know the terms of our employment of these men. He is not capable of telling what office these men occupy.

The WITNESS: I am, sir.

Mr. MONTAGUE: I ask that it be stricken out.

The COURT: No, I will not strike it out. Twelve men have got to be allowed to hear a story without these continued interruptions.

Mr. MONTAGUE: If he will just tell what Carson said or what was done, and not designate him as a representative or what not; I am anxious to come to that.

The COURT: But they will come to that later.

(61) Mr. MONTAGUE: Then why bother about these intermediate matters?

The COURT: Of course this gentleman does not know with any accuracy the positions in the Cudahy Company occupied by these men; all he knows is that they came to see him and he knows whether, in point of fact, what they did say was borne out when they would take an order from him, and whether the Cudahy Company filled that order.

Mr. BAKER: We expect to show more than that, your Honor; we expect to show that he went to the New York office and found Mr. Carson in charge there.

Mr. MONTAGUE: That is a good question.

Q. (By Mr. BAKER) Prior to February, 1914, did you have any difficulty with the Cudahy people in regard to cutting prices?

Mr. MONTAGUE: We object to that as calling for a conclusion of the witness. If he can say what was done and what he did and what they did, all well and good.

The COURT: Put it in this way: When did the first question of any kind arise between you and the Cudahy people with reference to cutting prices?

Mr. BOWIE: I do not understand that he ever had any difficulty, your Honor. There has been no testimony about it.

Mr. BAKER: He could not tell about it before I asked him.

Mr. BOWIE: You asked him when a thing commenced before you prove that it had commenced.

Mr. BAKER: I ask him what, if any, difficulty he had.

The COURT: The only other way to put it would be

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to tell if you had any difficulty, and if so, when and all about it.

(62) Mr. BAKER: I have limited my question to prior to 1914 because I want to take up the written correspondence at that time.

The COURT: Now then, in 1914, did this question of the cutting of the prices arise between you and the Cudahy Packing Company, and if so, when?

The WITNESS: My first difficulty, according to the best of my recollection, was some time in the early part of 1913.

Mr. MONTAGUE: I object to any testimony regarding 1913, as it is not a transaction which is referred to in the pleadings.

(Objection overruled; exception noted.)

The COURT: Damages can only be recovered for what occurred in 1914, but in proving whether there was a combination or what was done in 1914 was a part of some generally conceived plan, the story of what went before it within a reasonable length of time, would be admissible, I think.

Mr. MONTAGUE: I would have to object to that statement, your Honor, because he has not completed any transaction—

The COURT: But we must get along in this case, gentlemen, and the witness must be allowed to tell his story. It is impossible to pay attention to what the witness says with the constant interruption.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(63) Q. (By Mr. BAKER) Prior to February, 1914, tell us what, if anything, happened between you and the

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Cudahy Packing Company with regard to the cutting of prices.

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. I was called on in the spring of 1913 by a representative of the Cudahy Company—

Mr. MONTAGUE: I object to that.

The COURT: State who they were, if you can?

The WITNESS: To the best of my recollection it was Mr. Berry. They came then so frequently that it is hard to keep track of them. He came to see me and stated that he knew I was selling goods to an out of town jobber at less than the list prices and told me that I knew that was wrong and demanded that I submit to his inspection the charges covering the shipment. It was either Mr. Berry or Mr. Philip who demanded that I show him the charge.

In answer to subsequent questions the witness testified: I think he called with Mr. Sonnehill, the Baltimore representative of the Cudahy Company.

Q. Who was Mr. Sonnehill?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the (64) witness to answer, the defendant excepted, and now prays the court to sign and seal this its sixth-A bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes

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as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. He was the Baltimore representative of the Cudahy Company.

(Motion to strike out; motion overruled; exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its sixth-B bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: How can this law or any law be enforced in dealing with a large corporation which employs hundreds of agents if the man who deals with these agents can not tell that these agents came to see him and he has got to go into your internal organization to prove just precisely what position they occupied and all that sort of thing? I do not know how it can be done.

Mr. MONTAGUE: I will not argue the point, your Honor, I will just note my exception.

(65) Mr. BAKER: Now, go ahead.

The WITNESS: He called to see me and told me that he knew that I was selling the goods to an out of town jobber at less than the list price. He told me that I knew that that was contrary to what they wanted me to do and that I must show or must prove to his satisfaction that I had not sold at less than his list price. I took the charge down and turned to him and showed where it was billed at the proper list price and he went out of the office.

Mr. MONTAGUE: I move to strike out the answer.

(Motion overruled; exception noted.)

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Q. (By Mr. BAKER) About when was that? A. In the spring of 1913.

Q. And you say it was Mr. Berry or Mr. Philip? A. Yes, either Mr. Berry or Mr. Philip.

Q. Mr. Sonnehill was there? A. Yes.

Q. Did you have any conversation with Mr. Sonnehill in regard to the matter?

(Objected to; objection overruled; exception noted.)

A. Not that I can recall. He might have put in a few words here and there.

The WITNESS: (Answering further questions.) Prior to February, 1914, I had other conversations with Mr. Sonnehill in regard to the cutting of prices; I was continually having them myself every time he came to see us. Sonnehill called on me for about four years prior to the fall of 1913. In the latter part of the summer, or in the fall of 1913, he stopped calling on us. Every visit he made to us, I had conversations with him in regard to this price-cutting question.

Q. What would he say? A. The conversation was that New York was continually after him saying that (66) they understood that Frey was cutting prices, and he was not able to get any evidence that he was doing it. After Sonnehill ceased to call on us, I do not recall who called on us with regard to Old Dutch Cleanser until we were cut off.

Mr. SMITH: Plaintiff's Exhibit No. 1 is a postal card from Frey & Son, dated February 3, 1914. It is addressed to the Cudahy Packing Company at New York: "Please send at once 250 cases Dutch Cleanser. Very truly, Frey & Son, Incorporated."

The next is Plaintiff's Exhibit No. 2, being a letter from the Cudahy Packing Company to Messrs. Frey & Son, dated February 4, 1914: "Gentlemen: We beg to acknowledge and thank you for your order of the 3.^d requesting prompt shipment of 250 cases of Old Dutch Cleanser. If you will remit to us at the rate of \$3.20 per case, less 2 per cent for cash, we will be pleased to see that this order is promptly delivered. Yours very truly, The Cudahy Packing Company."

Q. (By Mr. BAKER) I want to ask you whether or not the price of \$3.20 per case mentioned in that letter was the wholesale price of Old Dutch Cleanser at that time?

Mr. MONTAGUE: We object to that; there is no such thing in our business as a wholesale price. We have a general sales list price.

Mr. SMITH: I object to counsel testifying.

The COURT: Yes, counsel can not testify.

Mr. MONTAGUE: I note an exception.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its seventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(67) Q. (By Mr. BAKER) What was the wholesale price or price to the wholesaler at the time you received this letter of February 4, 1914, marked "Plaintiff's Exhibit No. 2"? A. On that quantity it was \$2.95 a case.

Q. What was the price of \$3.20?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its eighth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. That was the regular price to the retail trade in 25 box lots or upward.

Mr. SMITH: I now read Plaintiff's Exhibit No. 3, be-

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ing a letter from Frey & Son, dated February 5, 1914, and addressed to the Cudahy Packing Company: "Dear Sir: Your letter of the 4th inst. received. I am certainly exceedingly surprised at its contents, particularly in view of the pleasant conversation I had recently with one of your representatives. Will you kindly write me the cause for this action. If you have any form of affidavit concerning the price maintenance feature of your selling contract, I will be pleased to sign same. I feel sure this action is taken through some wrong understanding of the situation here. I will be in New York Sunday and Monday and would be glad to call to save you to go over this matter with you. Kindly advise me at once if you will be at your office Monday morning and at what time, and I will call there to see you. Please advise me promptly as I leave here early Saturday Very truly, Walter A. Frey."

Now the answer to that letter is dated February 6, 1914, and addressed to Mr. Frey: "Dear Sir: In reply to yours of the 5th. The writer expects to be in New York all day Monday, February 9th. Very truly your, The Cudahy Packing Company."

This letter is initialed in the left hand side, "J. O. C." Can we not have this understood? These carbon copies, most of them, are not signed by the party who wrote them. There is a dictation sign in the left hand corner, for instance, J. O. C., and I judged that is J. O. Carson.

Mr. BOWIE: I do not know whether it is or not; I judge it is. The letter came from us, anyway.

The COURT: Whom did you see when you went there?

The WITNESS: I saw Mr. Carson.

Q. (By Mr. BAKER) Who was the person you refer to in this letter that you had a very pleasant conversation with? A. I could not recall the person. There were a number of representatives from the New York office traveling through and calling on the wholesale trade, and it was no doubt one of the New York office traveling representatives I referred to.

The WITNESS: I saw Mr. Carson when I went to New York in his private office in the Cudahy Building, or the warehouse of the Cudahy people. It was the Cudahy

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Packing Company's office I presume. It was a private office there for him to transact business in from the appearance of the layout. No one was present at my conversation except Mr. Carson and myself. This took place: I went in to see him and told him I had gotten his letter and was very much surprised at it and wanted to know why they had taken such an action as that and asked him to give me the evidence that he had. He said that he could not do that, that he had forwarded it to (69) Chicago and that the thing was beyond his control now, and that when he took an action like that he passed it on to the headquarters in Chicago and they had to handle it in the future. I told him I thought that was a very unjust action to take, to act in a summary way like that without calling on me to discuss the matter to see if we could not get on a basis, and he said, "Well, we had the evidence in black and white that you cut the prices of Old Dutch Cleanser, and I took action, I reported my action to Chicago, and I can not supply you with any goods. I said, There is nothing further I can do with you about it, then? He said, No, there was nothing further I could do, with him, that my future negotiations had to be with Chicago. That is about the sum total of what happened.

Q. Is that the substance of the conversation you had with him? A. Yes, that is the substance of it.

Q. Did he specifically state why he refused to sell you? A. Yes.

Q. What did he say? A. He said that I had cut the prices and that he had evidence that I had cut the prices and had seen it in black and white.

Q. Did he or not give any other reason? A. No other reason at all.

MR. SMITH: The next letter is Plaintiff's Exhibit No. 5, dated Baltimore, February 14, 1914, from Frey & Son to Mr. E. A. Straus, of the Cudahy Packing Company, Chicago, Illinois, and reads as follows:

"Dear Sir:

"I presume of course that you are familiar with the contents of the letter received by me from your New York office under date of February 4th.

"I am at a loss to understand the reason for this

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letter. It has always been my policy to maintain the (70) price on such articles that the manufacturer sold with that understanding and it has also been my policy to take summary action with any employee disregarding this. I have repeatedly advised your representatives when calling on us, of our position in this matter and have also asked them that if they secured anything definite to advise me of it, and I would be very pleased to take such steps as would prevent any further continuance, but that my own personal investigation led me to feel that these instructions were being lived up to.

"I think my action in refusing to supply goods to a firm who you had ceased to sell, which action I took on the request of your representative, was certainly an exhibition of our intention to co-operate with you in this matter.

"I would appreciate it very much if you would advise me of any instance where you have secured evidence of our failure to adhere to the list price. We can not possibly stop these things unless we know who is doing it and it is not being done, if at all, with our sanction or approval.

"The action taken by you in your letter of the 4th instant would be one of the very best boosts for me if I desired to make use of it through our trade but I have no desire at all to go into the market to demoralize the price of your goods, as that is not our policy of doing business, but on the other hand, our policy has always been, and still is, to co-operate with the manufacturer. I would say to you, however, that your goods are being generally rebated by every jobber here but in a very careful manner, which they can do by reason of the fact that they employ salesmen, whereas our business is entirely done in the city and out of town through the mail and every thing is open and above board and if there has been any rebating done it has been done in such a way that it has escaped any office records that might come under my observation.

"I enclose you a copy of our last catalogue showing our quotations on your goods which is sent to 11,000 merchants in this section of the country and which is our only selling medium.

"I would be pleased to hear from you advising me if there is not some basis on which we can settle this (71) matter and would greatly appreciate any informa-

tion that you can give me so that I can ascertain who has been giving these rebates.

"Very truly yours,

FREY & SON, INC. (Signed)

W. A. FREY, President." "WAF/MMM."

The WITNESS: Up to the time I was cut off the price of Old Dutch Cleanser had not been cut by me with my knowledge. After I was informed that they had some evidence that it was cut, I took the matter up with my different departments, never having had occasion to do so before, because I naturally presumed the price was being maintained. I found from Mr. Swift that there were some people to whom he was giving a special price on Old Dutch Cleanser. Up to this time we had not given any wholesaler a special price or divided profits with him, to my recollection.

Q. When you speak of yourself, do you refer to Frey & Son, or do you refer to yourself personally? A. The Frey Company and myself are the same thing.

Mr. SMITH: I now read Plaintiff's Exhibit No. 6, which is a letter dated February 16, 1914, to Frey & Son from the Cudahy Packing Company:

"We beg to acknowledge receipt of your favor of February 14th.

"When you called at our New York office recently, our Mr. Carson fully explained our proposition, and we can not add anything thereto at the present time.

"Your orders on us at our General Sales List prices will be taken care of—remittance less 2% for cash to accompany each said order.

"Yours very truly,

"THE CUDAHY PACKING CO."

The WITNESS: I would like to correct a previous answer of mine if I may. I did make one sale to another (72) other wholesale grocer, E. S. Janney, junior, of Philadelphia. That was in the latter part of 1912, I

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think. I think it was 100 cases. The goods that I sold him were my goods. I sold them below the price. Janney had done the same for me and it was an exchange of courtesy.

Q. (By Mr. BAKER) He says in this letter, "Your orders on us at our general sales list prices will be taken care of, remittance less 2 per cent for cash to accompany each said order." Now, what does that mean?

Mr. MONTAGUE: We object to that as calling for the contents of a written document. We are willing to produce the original document.

The COURT: Of course he can not change it, but that is a technical trade term that a man familiar with the trade can explain.

Mr. MONTAGUE: I object to the question, your Honor, as calling for the characterization by this witness of what is meant by a written document which I am willing to produce.

The COURT: But that document betrays a certain information to a person skilled in the trade, and the witness says that he has the skill to tell what that is, to interpret that; now, I hold that he can testify.

Mr. MONTAGUE: It seems to us that the best evidence for this jury would be to let them see the document and let them tell what it means.

The COURT: That is only true when the thing speaks for itself.

Mr. MONTAGUE: Here it is, and it is easy enough for the jury to tell what it means.

The COURT: I have given my ruling.

(Exception noted.)

The WITNESS: You did not read the whole letter.

Mr. BAKER: But what I wanted you to explain was (73) what is meant by these words: "Your orders on us at our general sales list prices will be taken care of, remittance less 2 per cent for cash to accompany each said order." What does "general list price" mean?

The WITNESS: Is that a reply to my letter to him?

Q. Yes. A. That was taken by me to mean—

Mr. MONTAGUE: I object to that.

Q. Do you know what it means? A. Yes.

The COURT: He can testify if he knows.

Mr. MONTAGUE: But it is not his letter, it is a letter to him.

The COURT: I know, but don't you see that when they wrote that to him that they at least suggest that he knows what they mean or they would not have written it. What significance that may have I do not know, and I doubt whether any gentleman of the jury knows whether that is the general list price and means the price they make the wholesale grocers or whether it is a price they make the retailers, and they wrote him as if he knew and he says he does know, so I hold that he can tell us.

Mr. MONTAGUE: But we do not want to allow him to testify as to any price from retailers and wholesalers; we have a general price and everybody, retailer or wholesaler—

Mr. SMITH: We object to Mr. Montague testifying about that.

Q. Do you know what that means? A. Yes.

Q. Tell us.

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the Court to sign and seal this its ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. That meant to me that they would not sell me at the wholesalers' price, but would sell me at the retailers' price for the quantity I wanted.

Mr. MONTAGUE: We object to the answer and move to strike it out.

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(Motion overruled; exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its tenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. SMITH: I now read Plaintiff's Exhibit No. 7, which is a letter dated Baltimore, February 26, 1914, from Frey & Son, addressed to Mr. E. A. Strauss, 111 West Monroe street, Chicago, Illinois, as follows:

"Dear Sir:

"In reply to your letter of the 16th inst., we of course would be in no way interested in your goods under the proposition outlined by your Mr. Carson.

"We have taken this matter up with you in a most friendly manner and with the spirit of cooperation but presume that your letter of the 16th inst. is your final position in the matter.

"We are to-day turning all the papers in this matter (75) over to the U. S. District Attorney to ascertain exactly what our rights in the premises are, also, of course, giving them your published jobbers prices and the correspondence we have had on the subject.

"We are

"Very truly yours,

"FREY & SON, INC.,

(Signed) W. A. FREY, President."

"WAF/MMM."

The WITNESS: I cannot recall receiving any answer to that letter.

Mr. SMITH: I now read Plaintiff's Exhibit No. 8, being a letter dated Baltimore, March 6, 1914, from Frey

& Son to the Cudahy Packing Company, 129 Hudson Street, New York, as follows:

"In reply to your letter of the 4th inst., we have not investigated the question of the delivery of this box of hand soap as immediately after advising us that you would not sell us Dutch Cleanser any longer, we sold out the balance of your other products that we had on hand. Of course, we will not handle any of them as long as we are not permitted to handle the entire line on the proper basis. I am very glad to say that we have been very successful in the sale of other cleansers which we have substituted on orders for Old Dutch Cleanser. We are

"Very truly yours,

"FREY & SON, INC.,
W. A. FREY, President."

"WAF:AM."

I also read Plaintiff's Exhibit No. 9, being a letter from Frey & Son, dated Baltimore, March 20, 1914, addressed to the Cudahy Packing Company at New (76) York, reading:

"Kindly send us 250 cases of Old Dutch Cleanser, and oblige,

"Very truly yours,
FREY & SON, INC.

(Signed) W. A. FREY, President."

I now read Plaintiff's Exhibit No. 10, being a letter from the Cudahy Packing Company to Frey & Son, dated March 25, 1914, and reading as follows:

"We have had referred to us your order of March 20th for 250 cases of Old Dutch Cleanser.

"If you will be kind enough to remit us at the rate of \$3.20 per case, less 2% for cash, we shall be glad to give you an order on our warehouse for Old Dutch Cleanser in any quantity from 25 cases upwards

"Yours very truly,

THE CUDAHY PACKING CO.

(Signed) E. A. STRAUSS."

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Q. (Mr. BAKER) What did the \$3.20 there represent at that time?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its eleventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. Their regular price to the retail trade.

Q. What was the price to the wholesaler at that time?

(77) (Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its twelfth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. \$2.95 a case for 250 case quantities.

Mr. SMITH: I now read Plaintiff's Exhibit No. 11, being a letter from Frey & Son dated Baltimore, April 1, 1914, addressed to the Cudahy Packing Company at Chicago, and reading as follows:

"We have before us your letter of the 25th instant. It certainly does seem to the writer as if a manufacturer of a product such as you make would certainly want the co-operation of every wholesale distributor.

"We do not feel that we have been treated at all right in this matter, but of course, you feel differently

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about it. Now, if there seems to be any principle involved, do you not think that you have had satisfaction enough by having taken the action you have taken and do you not think that it is time now for us to get together and co-operate in the distribution of Old Dutch Cleanser? We are

“Very truly yours,

“FREY & SON, INC., (Signed)

W. A. FREY, President.” “WAF/seg.”

The WITNESS: I do not recall any answer to that letter.

Mr. SMITH: I now read Plaintiff's Exhibit No. 12, which is a letter written by Frey & Son and dated Baltimore, April 18, 1914, addressed to the Cudahy Packing (78) Company at New York and reading as follows:

“I write your Chicago office several weeks ago in reference to the matter of distributing Dutch Cleanser, but have not heard from them in reply to our last letter.

“I am to-day in receipt of advice from other sources that you will again fill our orders, and that being the case I would be very pleased if you will ship us 250 cases of Old Dutch Cleanser.

“We are

Very truly yours,

“FREY & SON, INC.

(Signed) W. A. FREY, President. WAF/SEG.”

Q. (By Mr. BAKER) What did you mean by “other sources” in that letter? A. The salesman for the grape juice department of the Cudahy Packing Company wanted us to stock up on his grape juice and I told him I would not do it since the Cudahy Company would not let us have Old Dutch Cleanser; I told him that we would not sell the grape juice. He said he needed us to help him distribute in Baltimore, and he said, “You write to New York and I think very likely they will fix the matter up and sell you Old Dutch again,” and I did so.

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Mr. SMITH: I now read Plaintiff's Exhibit No. 13, being a letter from the Cudahy Packing Company to Frey & Son, dated April 20, 1914, as follows:

"We are in receipt of your favor of April 18th.

"Our Chicago Office recently quoted you, and the subject of your orders for Old Dutch Cleanser should be, therefore, taken up with them.

"Very truly yours,

THE CUDAHY PACKING COMPANY.

(Signed) E. A. S. O. D. C., Dept. EAS. B."

I now read Plaintiff's Exhibit No. 13½, being a letter from Frey & Son to the Cudahy Packing Company at Chicago, reading as follows:

"I have not been favored with a reply to my recent letter to you concerning Old Dutch Cleanser, but have received advice that you will again fill my orders.

"If this information is correct kindly instruct your New York office to deliver us 250 cases of Old Dutch Cleanser.

"We are,

Very truly yours,

FREY & SON, INC.,

....., President.

WAF/SEG." ..

I now read Plaintiff's Exhibit No. 14, being a letter from the Cudahy Packing Company at New York to Frey & Son dated April 24th, 1914, and reading as follows:

"In reply to yours of April 22d, we enclose a copy of our letter to you of March 25th.

"Yours truly,

THE CUDAHY PACKING CO. (Signed)

"E. A. S." "CC-New York."

WALTER A. FREY.

I now read Plaintiff's Exhibit No. 15, being a letter from the Cudahy Packing Company to Frey & Son, dated Chicago, May 16, 1914, and reading as follows:

"Wholesale Margarine.

"We are looking for suitable wholesale connections in Baltimore to handle our high grade margarine, and we write you asking that you give the matter serious consideration and advise us promptly if you are interested in the proposition.

"We are manufacturers of high grade oleomargarine, both tinted with the natural color and pure white. The quality of our goods on both grades is unexcelled by any manufacturer in the country. On our high grade white (80) margarines we make a special quality in both body, texture and flavor. You will find the body of these goods especially accessible to the trade in Baltimore.

"We trust that you will give the matter prompt and serious consideration, and favor us with a reply in the immediate future.

"Yours very truly,

THE CUDAHY PACKING CO.

(Signed) A. E. SEYMOUR, Butterine Department."
"ABS-REL."

I now read Plaintiff's Exhibit No. 16 being a letter of Frey & Son dated Baltimore, May 25, 1914, addressed to the Cudahy Packing Company at West Monroe Street, Chicago, and reading as follows:

"In reply to your letter of the 16th instant from your Mr. Seymour we would not care to take up anything at all with your Company owing to the fact that we are not at present doing business with you, by reason of the attitude taken by your Mr. Strcus on Old Dutch Cleanser.

"We have sold out of all the products that you manufacture and have refused to buy any of them at all as long as you refuse to sell us Old Dutch Cleanser at the proper price. Futhermore, I regret to have to

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say that if I find any of the Wholesale Grocers handling your Margarine I will feel compelled to stock this goods of the Manufacture of one of your competitors, as I am fully determined that if Mr. Straus is looking for a fight in Baltimore he is welcome to it and we will, most certainly, be found to be strict competitors on any article that the Cudahy Company attempts to market in Baltimore.

"We have refused to handle any of the orders taken by your men on Grape Juice this season.

(S1) "We are,

Very truly yours,

FREY & SON, INC.,

(Signed) W. A. FREY, President." "WAF SEG."

I now read Plaintiff's Exhibit No. 17, being a letter of Frey & Son dated Baltimore, July 13, 1914, addressed to E. A. Straus, The Cudahy Packing Company, Chicago, Illinois, and reading as follows:

"We have recently been called upon by a number of representatives from different branches of your concern and also have been written to from your Chicago office. I have of course, persistently refused to have any dealings with them owing to the fact of the disagreement between ourselves and had really never intended to take this matter up with you again owing to the evident firm standing taken by you in your last letter, but the last gentlemen who called to see me suggested that I again write you and I am therefore doing so. It certainly appears to me that we should be able to get together and co-operate in the distribution of Old Dutch Cleanser. It, of course, would be impossible to distribute on the margin of profit that we would be able to secure were we to purchase at the price named in your last several letters but we feel that our wide distribution would be a good thing for you and trust that you will take this matter up with the idea of our again being put on your list as distributors. We are,

Yours very truly,

FREY & SON, INC.,

(Signed) W. A. FREY, President."

"WAF/RG."

WALTER A. FREY.

I now read Plaintiff's Exhibit No. 18, being a letter of Frey & Son, dated Baltimore, November 13th, 1914, and addressed to the Cudahy Packing Company at New York, as follows:

(82) "We have now been off of your distributing list for about a year, not handling any of your products at all.

"We have simply advised our trade that we did not handle any of them, and we trust that you have therefore had no complaints of any kind from this territory. Whether your total output has been as large as previously or not we of course cannot tell, although we know of no reason why it should not have been, as you create the demand and not the jobber.

"However, we do not feel that the purpose at which you aimed has been achieved at all. That is, the elimination of price cutting.

"Yesterday for the first time since ceasing to buy direct from you, we wanted a case of Old Dutch Cleanser for one of our particular customers who buys all his goods from us. We asked a very good friend of ours to get us a case from one of the largest jobbers here, and he did so, bringing back the bill which showed he had paid \$3.40 less 20 cents less 2 per cent. Thus you will see that the retailers are still buying their goods at less than your list price.

"Do you not think it would be fore the best interests of your concern to get together with us, and have our assistance in the distributing of Old Dutch Cleanser and your other products.

"Let us hear from you and if desirable I will call to see you when in New York.

"Very truly yours,

(Signed) WALTER A. FREY."

I now read Plaintiff's Exhibit No. 19, being a letter from Frey & Son dated Baltimore, March 12, 1915, addressed to the Cudahy Packing Company at New York, reading as follows:

(83) "Enclosed kindly find our check for 50 cases of Old Dutch Cleanser at \$3.00 per case less 2% cash dis-

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count which we wish you would kindly send us at once, and oblige,

“Very truly yours,

FREY & SON, INC. (Signed)

W. A. FREY, President.” “WAF/RG.”

Q. (Mr. BAKER) What does the price represent there?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirteenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. The price to the wholesaler for that quantity.

Mr. SMITH: I now read Plaintiff's Exhibit No. 20, being a letter of the Cudahy Packing Company dated March 16, 1915, written from Chicago and addressed to Messrs. Frey & Son, as follows:

“We return herewith your check for \$147, which you sent us with your letter of the 12th, to cover your order for 50 cases Old Dutch Cleanser. The price is incorrect, in accordance with our previous advices. If you will remit us at the rate of \$3.20 per case, less 2% cash discount, your order will receive our prompt attention.

(84)

“Yours very truly,

THE CUDAHY PACKING COMPANY,

(Signed) E. A. S.”

Q. (By Mr. BAKER) The \$3.20 was what price?

(Objected to: objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its fourteenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. The regular price to the retail trade.

The witness was then shown a check dated March 12, 1915, and asked, what is that check? He answered that check represented the price at which they were selling—(witness interrupted).

A. (Continuing) That is the check I sent to Cudahy at New York with that letter for 50 cases to cover the cost figured on the price to the jobber. They sent it back with their letter. Those are the two last letters that I am referring to.

Mr. BAKER: We offer that check in evidence.

(Check referred to having been offered in evidence was marked "Plaintiff's Exhibit No. 21.")

Frey & Son Invoice	15,000
Incorporated Deduction 2%	300
Balance	14,700

Baltimore, Md., Mar. 12, 1915. No. 15001.

Pay to the Order of Cudahy Packing Co. . . \$147.00
One Hundred and forty-seven and 00 100 Dollars.

(Across Face:)

Certified

Mar. 12, 1915,

Dunn, Teller

WALTER A. FREY.

Fam. & Mer. Nat. Bank
Baltimore, Md.

Do Not Destroy this Check.

To Farmers and Merchants)	Frey & Son, Incorporated,
National Bank, Baltimore,)	Walter A. Frey,
Md.)	Treasurer.

(85) The WITNESS: After they returned it to me I endorsed it and deposited it back to my own account. After February 3, 1914, when I sent the order and they answered in their letter of February 4, 1914, I have not bought any Old Dutch Cleanser from the Cudahy Packing Company. I did not attempt to buy it from the Cudahy concern by any other means than by these letters that we have here. After February 3rd, 1914, no one selling Old Dutch Cleanser from the Cudahy people called on me.

Q. After February 4, 1914, what attempt, if any, did you make to get Old Dutch Cleanser from other wholesalers?

Mr. MONTAGUE: I object. Until it can be shown that any persons to whom he applied were actually in some conspiracy or agreement, any transactions between other persons and this defendant are inadmissible.

The COURT: He is bound to do his best to diminish damages, and it is admissible for him to prove this although those statements would not be evidence against you, but the fact that he tried unsuccessfully to get the Old Dutch Cleanser is proper in his case to show that he did all he could to diminish the damages.

Mr. MONTAGUE: If the testimony is offered and the question is asked merely for that purpose—

The COURT: He can testify to what happened in the sense that he tried to get the goods and did not succeed in getting them, or did not succeed in getting them at such and such prices. Any statements that the people made to him as to why they could not sell him are inadmissible.

Mr. BAKER: I do not want your Honor to rule on that proposition without hearing from us. If we show, as we expect to show that there was a system in the sale of this Old Dutch Cleanser, and if any wholesaler (86) became a part of that system—

The COURT: If you go far enough—I will not let it in now—but if you go far enough to raise a question for

the jury to pass upon as to whether certain people who made statements to him were not then parties to a combination or agreement, then actively going on, if you raise that issue then the jury will be entitled, if they find there was such an agreement and those persons were parties to it, to take their statement as evidence against their co-conspirators, if we may use that term.

Mr. BAKER: It seems to me that we are putting the cart before the horse; you can prove a conspiracy by the statements of these people.

The COURT: No, you can not, that you can not do.

Mr. BAKER: Just the same as you can prove a conspiracy by overt acts.

The COURT: You can prove it by overt acts, unquestionably. But I adhere to my ruling and for the present I will not allow evidence of the unsworn statements of these wholesalers. I will allow you to prove that he tried to get the stuff, and at what prices, if any, the stuff was quoted to him by these people, and then it may be that at a later stage of the case I will let you prove what those people said.

Q. (By Mr. BAKER) What effort, if any, did you make to get Old Dutch Cleanser from other wholesalers?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its fifteenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(87) A. I wrote to the wholesale grocers in Norfolk.

Mr. MONTAGUE: I would like to express another objection, if your Honor pleases. Let me recall to your Honor that I served a demand for a bill of particulars in this case asking the plaintiff to enumerate the persons to whom he made application. Your Honor disallowed the bill of particulars, so we are absolutely without any

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particulars, as to any of these alleged persons to whom he made application. Under these circumstances I would (88) like to state that this is a matter of surprise to us as to the identity of any persons to whom he may have made application.

The COURT: You are not being held liable now for anything except that he is proving the very negative fact that he did make attempts to get this stuff, to do what he could to minimize the damage that he suffered from you, if, in point of fact, the jury finds that he did so suffer. He was bound then to do the best he could to keep that damage from mounting up unnecessarily. To that extent there is no bill of particulars required.

(Exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its sixteenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. Did you send out a form letter? A. Yes.

Q. To whom did you send it?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its seventeenth bill of exceptions, which is accordingly done this 10 day of (89) August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. The wholesale grocers in Richmond, Norfolk, Pittsburgh, and I wrote to New York, Philadelphia, Wilmington, I think it was Wilmington, and I have a list

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of everybody I sent it to attached to the form of the letter that went to every one of these people.

(Motion to strike out answer; motion overruled; exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was note, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its eighteenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. I show you a form letter dated February 6, 1914, and ask you whether or not you have a list attached showing to whom you sent it?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted and now prays the court to sign and seal this its nineteenth bill (90) of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. This is the form of the letter that was sent to each one of these people. This is the list I gave the stenographer and dictated the letter and this is the carbon copy of it.

Mr. BAKER: I offer the carbon copy in evidence and also the list.

(Objected to.)

(Letter and list shown to the Court.)

The COURT: I understand your objection is not to

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the method of proving the particular fact that he sent it to these people, but that no matter how it is proved it is not material to this case?

Mr. MONTAGUE: That is it precisely.

The COURT: I rule against you on that so let it be noted that the defendant objects on the ground that in view of the request for the bill of particulars heretofore made in the case, and the statement then made by the plaintiff, this list and this letter are not admissible, but he does not base his objection upon the mere form of the carbon copy of the letter.

(Exception noted by counsel for defendant.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and admitting the paper in evidence, the defendant excepted, and now prays the court to sign and seal this its twentieth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the (91) trial of this case.

JOHN C. ROSE, Judge. (Seal)

(Paper referred to, having been offered in evidence, was marked, "Plaintiff's Exhibit No. 22", and is as follows:

"February 6, 14.

"Messrs. W. & J. Parker,

"Portsmouth, Va.

"Dear Sirs:

"Can you supply me with some Old Dutch Cleanser?

"I will send you my personal check with order for same, made out in whatever way desired so that there need be no record of the transaction.

"I will greatly appreciate any courtesy you can extend and will be pleased to reciprocate at any time.

"Kindly advise how many you can ship and at what price.

"Thanking you in advance, I am

"Very truly yours,

FREY & SON, INC.,

....., President."

"WAF MMM."

Attached to that letter is a list of names as follows:

A. B. Abbitt & Company, Newport News, Va.;
Bolling Grocery Company, Newport News, Va.;
S. W. Holt & Company, Newport News, Va.

Norfolk, Va.

G. & R. Barrett, Inc.;
A. Brinkley & Company, Inc.;
The Four Company;
Lewis, Hubbard, Slack Company,
Shelfsky, Hornthal Company,
J. W. Pedin & Company,
(92) The Southern Distributing Company,
Virginia Gro Co.,
R. P. Voight Company,
E. L. Woodward Company.

Portsmouth, Va.

W. & J. Parker,
Jacobsen Brothers,
T. L. Cleaton.

Richmond, Va.

C. W. Antrim & Sons,
Charles E. Brauer Company,
Christian Winifree Company,
Charles Davenport & Company,
Fleming & Christian Company,
E. W. Gates & Sons Company,
W. H. Harris Grocery Company,
Harvey Blair & Company,
E. A. Saunders Sons Company,
Spence Runnamaker Company,
Stokes-Grymes Groc. Co.

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Q. (Mr. BAKER) I will ask you whether or not you succeeded in purchasing any of the Old Dutch Cleanser from any of these people to whom you sent the letter?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its twenty-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(93) A. I succeeded in getting one lot of ten cases from S. W. Holt & Company, and could not get any more from anybody.

Q. What did you pay for it?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its twenty-second bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: This is all intended, as far as it goes, to refer to the question of damages.

A. I think I paid \$3.10 a case.

Q. What was the wholesale price for which you paid \$3.10?

Mr. MONTAGUE: That is objected to on the ground that it calls for a conclusion of the witness.

(Objection overruled; exception noted.)

A. That was \$3.10 and I had to pay the freight, which made it cost me \$3.18 in Baltimore.

Q. What was the wholesale price?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its twenty-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

.94) A. Three dollars. I do not think there was a wholesale price on ten cases, however; I don't think I could buy less than 25.

Q. What was the price of the ten cases if you bought it directly from the Cudahy Company? A. I do not think I could have bought ten cases from the Cudahy Company.

Q. (Mr. BAKER) Did you send out any other letters?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the Court to sign and seal this its twenty-fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. I wrote to Austin Nichols of New York.

Q. I will ask you whether or not, on February 20th, you sent out any letter trying to get Old Dutch Cleanser?

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(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the Court to sign and seal this its twenty-fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(Q) A. Yes, I did.

Q. Is that a copy of the letter you sent out (handing paper to witness). A. Yes, that is.

Mr. BAKER: We offer that paper in evidence.

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and admitting the paper in evidence, the defendant excepted, and now prays the court to sign and seal this its twenty-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(Paper referred to, having been offered in evidence, was marked "Plaintiff's Exhibit No. 23", and is as follows:

"February 20,—14.

"Messrs. Selman Bros.,

"New York, N. Y.

"Gentlemen:

"We are having a little disagreement with the Cudahy Packing Company, manufacturers of Old Dutch Cleanser.

"Can you supply us with any of these goods?

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"If so please advise us what you can ship us and what you will charge for it and I will send you a check to cover.

"Anything that you can do will be greatly appreciated and we will be pleased to reciprocate whenever possible.

(96)

Very truly yours,

"FREY & SOX, INC.,

"....., President."

WAF MMM.

Q. To whom was the letter sent? A. To all the names on these two papers.

Q. Can you remember the names, of your own knowledge? A. No, sir, that would be impossible.

Q. Read the names.

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its twenty-seventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(Witness read names contained on list.)

Q. In answer to that letter to the persons to whom you have stated you sent it, did you or not succeed in purchasing any Old Dutch Cleanser?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its twenty-eighth bill of (97) exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes

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as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. I did not.

Q. Who are these people that you sent this letter and the former letter of the 6th to?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its twenty-ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. They are all wholesale grocers.

Q. What, if any, attempts did you make in the city of Baltimore to get Old Dutch Cleanser from the wholesale grocers?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirtieth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. I made no attempt here except one. I called one up.

(Objected to.)

Q. Who did you attempt to get it from here?

(Objected to; objection overruled; exceptions noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the Court to sign and seal this its thirtieth-and-a-half bill of exceptions, which is accordingly done, this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. Reiter & Company.

Q. Did you or not succeed in getting any from him?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(99) A. He quoted me the regular price to the retail trade for whatever quantity I would buy.

The COURT: I understand you did not get anything from A. Reiter?

The WITNESS: Not at that time.

Q. Have you at any time bought anything from A. Reiter?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-second bill of exceptions, which is accordingly done this 10 day of

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August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. In October, 1916.

The COURT: We will leave that out for the moment. If I go into the question of the extent of damages that can come out.

Q. (By Mr. BAKER) Did any one at any time coming from the Cudahy Packing Company say anything to you as to what right, if any, a wholesale grocer had to sell to another wholesale grocer? A. Yes.

Q. Who was it? A. Either Mr. Philp or Mr. Berry at the time he called on me in 1913.

Q. What did he say? A. He told me I was selling out of town men at less than the list price and I knew I could not do that.

(Objected to as repetition.)

(100) The COURT: What was it?

The WITNESS: Their representatives came down and said he understood that I was selling to an out-of-town jobber at less than the list price and I knew I was not permitted to do that, and if there was any other than the retail price to be given to anybody, that the Cudahy Company was the only one to do that.

Mr. MONTAGUE: I move to strike the answer out on the ground that it is long prior to the events which have been testified to.

(Motion overruled; exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. What, if anything, had this conversation to do with your not applying to other wholesale grocers in the City of Baltimore for the Old Dutch Cleanser?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objections aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(101) A. It showed me that they were being very strict with the jobbers here.

(Motion to strike out granted.)

Q. What, if anything, had this conversation to do with your not applying to other wholesale grocers in the city of Baltimore for the Old Dutch Cleanser? A. My reply would be the same, it demonstrated to me that they were being very strict with the wholesalers in Baltimore.

The COURT: Taking that into account you did not think it worth while to do it, is that it?

The WITNESS: Yes, absolutely. From the time we were cut off down to the time of the bringing of the suit we were able only to purchase ten cases from a man at Newport News, by the name of Holt. It was referred to in that letter of the 14th.

Q. (By Mr. BAKER) Do you know the volume of business that you did in Old Dutch Cleanser three years prior to February 4, 1914?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the

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witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. I prepared an actual list of our purchases right there on our desk.

The COURT: What did you prepare it from?

(102) The WITNESS: From our purchase journal.

The COURT: That is all of your knowledge on the subject?

The WITNESS: Yes.

Q. You can produce the journal, can you? A. Oh, yes.

Q. Can you take the years back of February, 1914, for a period of three years and give us the general volume of your business?

(Objected to.)

Q. Do you know the general volume of your business? A. Yes.

The COURT: If you know the general volume of your business, speaking in \$50,000 lots, or something of that kind, can you give it?

The WITNESS: Yes.

The COURT: What is that you have in your hand now?

The WITNESS: That is a memorandum that I got up from our books.

The COURT: If you can not trust to your own memory about it then you will have to produce your books.

Q. (By Mr. BAKER) How many books would you have to bring here to show that list? A. I have this memorandum from which I took this copy prepared in the confidential book which I keep of the condition of my business showing everything.

Q. You can bring that one book here and show it,

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can you? A. I would not want to show that book unless I would have to. I can swear to the accuracy of these figures.

The COURT: If you only happened to have a memory of it, all you needed to do would be to come here and say that you knew the volume.

The WITNESS: I can give it to you without referring to this approximately, your Honor.

(130) Mr. MONTAGUE: I object to it on the ground that it is incompetent, irrelevant and immaterial, and on the further ground that by the witness' own testimony his statement is not the best evidence and he himself had to prepare it from books which are not here nor in evidence, and it does not appear that he even kept those books himself.

The WITNESS: Yes, I kept them.

The COURT: I think you had better prove it in the full way if you want to rely on it. The witness does seem to show that except for this case, he hadn't it clearly in his head.

The WITNESS: I thought you wanted it in dollars and cents. I can give it approximately.

The COURT: If you can at any time tell the approximate amount of your business and say that you carried that in your head from year to year, you may testify to that.

(Exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. Do you know the volume of your business for the three years back of February, 1914, and can you give it to us?

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(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now (104) prays the Court to sign and seal this its thirty-seventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(105) A. Back in 1911 our total volume was about \$1,200,000. In 1912 our volume was about \$1,400,000. In 1913 it was a little less than \$1,200,000. In 1914 it was nearly 1,600,000.

Q. And in 1915, what was it?

Mr. MONTAGUE: I object to 1915 on the ground that this suit was begun in 1915, on May 12th.

The COURT: Part of the time is covered by it and it shows the general trend.

(Exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-seventh-a bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: It was approximately \$1,700,000.

Q. (By Mr. BAKER) Now I ask you about 1916.

(Objected to.)

The COURT: I will let you state the 1916 volume of business and we can strike it out after we come to the

prayers on the measure of damages. I will admit it subject to exception.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-seventh (106) bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. It was over a million eight hundred thousand.

Q. In regard to the cost of doing business, the ratio compared with the volume of business—

Mr. MONTAGUE: We object to that on the ground previously stated, and once more suggest that the witness be asked if he knows of his own knowledge.

Q. Do you know of your own knowledge the cost of carrying on the business? A. Yes.

Q. Does it differ in different years or not? A. It varies very slightly.

Q. Can you take these several years that you have mentioned and tell us about the average cost of carrying on business. A. Our average cost it about 6½ per cent.

Mr. BOWIE: This witness is testifying as to matters that the experts differ on, your Honor. We are entitled to see what goes in to make up these figures, before he gives them to the jury. We are entitled to know how he administers his office in figuring his cost. This is not one man doing business who can tell by what he has in the lefthand pocket and what he has in his righthand pocket just where he stands, but we are entitled to know the elements that enter into his making up his cost average. (107) The COURT: I am inclined to think that he can testify what is the percentage and then you can cross examine him about that and you may be entitled, on your cross examination to call for the production of the books that he is talking about. I do not think your objection can be sustained, but I think in the course of the cross

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examination, if you wanted to, you would be able to compel the production of these books. But I do not think

STONE FOUR emfwy shrdl etaoi shrdl etaoium (108) you can object to the president of the company stating what percentage his profit bears to his total sales. The simplest question to ask him on that, I think, will bring out pretty much what you want, and that is really whether there is a profit in his business and if he knows what the percentage that profit is of his sales and whether or not, if he had Dutch Cleanser, the price that he would have gotten for it would have given him greater or less than his average. That is all there is about it. We are not concerned with whether this man's business is big or little except in so far as it throws light on the probable quantity of cases of Dutch Cleanser that he could have sold if he had gotten it and about what money he would have cleared on it, if he had a chance to sell it. The quantum of damages in this case will not probably run into a very large figure. It is not real important, gentlemen, and I am suggesting it to you as practical common sense on both sides, that to be precisely and minutely accurate on such questions as the percentage of profit is in this case quite unnecessary. If, as I guess from what I heard in another similar case, he does not figure a very large percentage of profit, it will not be important. If he were claiming twenty-five or thirty-five or forty per cent profit it would be worth your while to show whether he was or not five or ten per cent too high.

(Exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-seventh-e- bill of exceptions, which is accordingly done this 10 day of (109) August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: Have you gone through the books and calculated these profits?

The WITNESS: I have gone through books and calculated the amount of Old Dutch Cleanser we have bought. I know my own figures on the total sales and total profits

and expenses, because I got up all that record myself, made it up from the reports each day from the different department of the business.

The COURT: If you gentlemen want an opportunity for an expert to examine these books on this question, I think I am bound to let your people examine his books. Now whether it is worth while to go through the form of bringing up a lot of these books to this courtroom, or to let you go down and examine them at his place, is another question.

Mr. MONTAGUE: If Mr. Frey is the man who went over the books, I suggest the best way is to go over the books and let me examine him on those books so that the jury can see just how carefully he went into those calculations. Cost is a pretty difficult thing always to calculate. He has not yet vouchsafed to us his method of computing it and there seems to be no way of bringing it out until we have him on cross examination.

Q. Tell us the percentage cost of your carrying on your general business.

(Objected to; objection overruled; exception noted.)

(110) To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-seventh-d-bill of exception, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. The cost of carrying on our business in 1912 was about 4½ to 5 per cent. In 1913 the cost of carrying on the business was about a little over 5 per cent on the sales. In 1914 the cost of carrying on the business was a little under 5 per cent, likewise in 1915.

Mr. MONTAGUE: I object to that on the additional ground that it covers a period subsequent to the commencement of this action.

The COURT: My ruling on that is that I will take all

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that in subject to exception. You need not take any special exception to that.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-seventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(111) The WITNESS: In 1916 the cost was a little over 5 per cent and for 1915 a little under 5 per cent. Roughly, for the period, it was something like 5 per cent as the cost.

The COURT: What were your gross profits then?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-eight bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: On the sales?

The COURT: Yes.

The WITNESS: In 1913 they were about 1 per cent.

The COURT: Gross profits?

The WITNESS: Oh, no, sir, I was figuring on the net. The gross profit was a little over six per cent on the entire sales. In 1914 they were over six per cent. In 1915 they were a little under nine per cent. In 1916 they were between eight and nine per cent. In 1915 they were between eight and nine per cent.

The COURT: Your net profit ranged from something over one per cent to something under four per cent.

(Objected to; objection overruled; exception noted.)

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To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its thirty-ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to intents and purposes as (112) if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Said)

The Witness: A little over four per cent last year, or just about four per cent.

To subsequent questions the witness said: I made up a typewritten list of the sales of Old Dutch Cleanser during 1911-12 and -13, down to the time we were cut off. I got this from our purchase journals, which is a copy of all invoices.

Q. Have you your purchase journal with you? A. There is a colored man bringing it up on the wagon now and I thought he would be here before I was.

Q. What books have you here? A. I have the personal books that have some of that information asked for, but I do not like to use those. There is a great deal of personal and private matter in them.

The COURT: The trouble is this, of course; You are undertaking to show what would happen if something which did not happen had happened. It was your fault that the other thing did not happen. In point of fact, you did not get any Dutch Cleanser during most of 1914 and 1915 to sell and you are asked to be awarded damages because you couldn't get it. You are trying to show first how much you could have sold if you had been able to get it, and one of the ways in which you are undertaking to show that is to show that what you sold during the one, two or three years preceding that time, to show what your business was during those three preceding years, and then show what your general business was during the period under controversy beginning in 1914 and from that figure, if you did sell 300 cases, we will say, in 1913, and when your business jumped to a million four hundred thousand dollars, or from eight to ten per cent within a year, that you would then have sold

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three hundred and thirty cases of Old Dutch Cleanser, (113) and so on for the succeeding years. That requires you to show that the total volume of your business in each of those years was and also precisely what was the number of cases of Dutch Cleanser that you sold in the preceding years. Now you testified to that. Now the other side are not certain that you are quite accurate in that; you may be mistaken in some way about that and they want to look at the books to see whether you are accurate or not. Then when it comes to a question of how much was the volume of your business, they are not content to take your say so for that, but they want to look at the figures for themselves, and then when it comes to determining many cases you would have sold the next question is, How much would you have made on them if you had sold them?

The WITNESS: I am very glad to give them all that, your Honor, and there is one book here in which those totals are, and I would like to show them the totals and how we arrive at them; I can show them the entire system.

The COURT: If there are other things in that book that have no connection whatever with that line of proof, neither I nor anybody else wants to look at that.

The WITNESS: I would not like to leave them here as an exhibit to be run through by others.

The COURT: No, they will look at such portions of the books as are necessary and then anything else that is wanted from them can be dictated to the stenographer.

The WITNESS: All right, sir. That is the only point I wanted to make.

Q. (By Mr. BAKER) Take the books that show the amount of Old Dutch Cleanser that you purchased and sold during the year 1911.

The COURT: If you have that all totaled, just offer that and refer Mr. Montague and Colonel Bowie to those books.

The WITNESS: I also have the pages from our cash (114) book showing the payment.

Q. (By Mr. BAKER) Will you tell us what those books show us as to 1911? A. 1,750 cases.

Q. Do they show the dates of the purchases? A. Yes.

Q. Whatever you bought you sold, didn't you? A. Yes.

MR. MONTAGUE: Not necessarily, I take it; he might have carried it over a year.

Q. Do these show your sales or purchases? A. These show my purchases. Take the year 1911, 1,750 cases. Those cases cost us \$2.95 a case. Barring the ones that we cut the prices on, we sold them for \$3.40. I can not answer exactly how many we cut prices on in 1911. There were less than five people that Mr. Swift told me about at the time to whom he gave a special price on Old Dutch Cleanser.

MR. BOWIE: The books would show that. We do not want to require him to dig into a mass of books, but what Mr. Swift told him is certainly not evidence.

THE COURT: It would be an awful job to go through those books and figure it out. Perhaps the books will not show it very clearly.

THE WITNESS: They will not.

THE COURT: Some of the bills may have been billed an "old credit", or some other such statement put on the bill, which really is a rebate.

MR. BOWIE: That is what we would like to know.

THE WITNESS: We bought them at \$2.95, less two per cent, and we sold some of them at \$3.40, in most cases less no per cent. Very few of the retail trade take their cash discount.

Q. (By MR. BAKER) And you sold it at three dollars and forty cents? A. Yes.

(115) Q. Except the ones where the price was cut? A. Yes, and there but few of those cases.

THE COURT: Do you know the minimum price which they sold for?

THE WITNESS: Mr. Swift told me at the time I investigated it that the best price he had ever given on it was \$3.15. Now take 1912. We bought 3,150 cases. They all cost me \$2.95 a case except two lots of seven hundred cases, separate carload shipments, which cost \$2.92½ a case, each subject to the cash discount of two per cent.

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Q. (By Mr. BAKER) Did you cut the prices of any of the others that you remember? A. I can not answer that of my personal knowledge. That was the result of my report from Swift only; there were less than five people to whom we gave a special price.

The WITNESS: (Answering further questions. Now, in 1913, we bought 1,753 acres. That was a year after the change, when there was a drop in the business. They all cost me \$2.95 a case, except three cases, that was a drop shipment and that cost me three dollars a case. Cudahy made a drop shipment to one of our customers. All that was two per cent off for cash. The total volume of our business, in 1912 and 1913, dropped very heavily. I do not know of any special explanation of it, except that we got two big shipments in November and December of 1912, which carried us over until February, 1913, and it was the first year of the change and I did not push the business very hard. I mean a change in our own internal arrangements. I was kind of letting things go a little easy for a year. In 1914 I got ten cases from Holt, but from the Cudahy people none. Of the 1,753 cases I can not tell you how many the prices were cut on. The Philadelphia shipment was a shipment in the latter part of 1912 that I made to B. S. Janey of 100 cases on which the price was cut, the price being three dollars f. o. b. Baltimore.

(116) Q. What per cent of the volume of your business for the year 1911 was Old Dutch Cleanser?

Mr. MONTAGUE: We object to that. It speaks for itself, it is a matter of computation.

The COURT: Yes, but not everybody can made the calculation quickly and there is no reason why the jury could not have that before them.

(Exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its fortieth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if

prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: I will have to figure that out, your Honor. It was very, very small, compared with the total business.

The COURT: What was the total volume of your business in that year 1911?

Mr. BOWIE: One million three hundred thousand dollars he said.

The COURT: A little less than one-half of one per cent, whether \$3.15 a case or \$3.40 a case was obtained for it.

Q. (By Mr. BAKER) What percentage of your carrying on the business would be a charge against the Old Dutch Cleanser?

The WITNESS: The total expense of doing business were \$60,326.42 in our fiscal year from November 4, 1912, to November 4, 1913.

(117) Q. What part of that charge would be charged to the Old Dutch Cleanser sales; in other words, if you were selling Old Dutch Cleanser in 1914 and 1915— A. I am speaking here of 1913.

Q. In 1913, then, what quantity of that charge would go to the sales of Old Dutch Cleanser? A. I could have sold all the Old Dutch Cleanser in 1912 and 1913, without adding a cent to this cost of doing business, because the amount was too small, it would have just been absorbed in the whole. I had to have that organization to do that volume of business and that would not add to the cost of doing business when we already have the organization. We do not have to have a separate department for the Old Dutch Cleanser. It is right with the soaps and soap powders and scouring powders. I have no figures for 1912, showing cost of doing business. November, 1912, was when I took over the business. The gross cost of doing business in the fiscal year 1913-1914 was \$67,459.82.

Q. Now the next year, and give the dates?

(118) Mr. MONTAGUE: May I object not only on the ground that it is incompetent, irrelevant and immaterial

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but also on the ground that it covers a time not covered by the suit?

The Court: There is nothing inflammatory about this testimony, so I can pass upon that when we come to the prayers. I will admit this subject to exception.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its forty-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The Witness. The cost of doing business was \$70,977.78 from the 4th of November, 1914, to the 4th of November, 1915.

Q. (By Mr. BAKER) Now give us the next year.

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its forty-second bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

(119)

JOHN C. ROSE, Judge. (Seal)

A. The expense was \$74,646.02 from November 4th, 1915, to November 4th, 1916.

In answer to subsequent questions, the witness testified: If we had handled Dutch Cleanser during this period of time it would not have added a bit to the expense of the business.

Q. Now, in the memorandum that you have of 1911, 1912, and 1913, you have given the wholesale price of Old Dutch Cleanser at each time you made a purchase? A. Total amount that the two hundred and fifty cases cost, Yes.

Q. And the books show that? A. Yes.

Q. And you total the price there? A. That is the less two per cent.

Q. That memorandum, I believe, shows each purchase? A. That is right.

Q. Now the retail price of the Old Dutch Cleanser covering 1911 was what? A. \$3.40.

Q. Was that as to all of it? A. That was the retail price in single case lots, one, two, three and four case lots. In five case lots it was three dollars and thirty cents and in twenty-five cases it was \$3.20. Whether there was a special price on ten cases or not, I do not recall any longer.

Mr. MONTAGUE: I move to strike out the answer with reference to retail and instead of that I ask that it be stated that that was the price to others than general distributing agents.

(120) The COURT: That I do not know anything in the world about as yet. I can not know anything about it from the testimony that has been brought out thus far. I can not state that about anything that I do not officially know.

(Exception noted.)

To the overruling of the defendant's motion aforesaid, to which exceptions was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its forty-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: In 1912 the prices were the same on the Old Dutch Cleanser. In 1913 the prices were the same. In 1914 and 1915 the prices to the retailer were the same as in the preceding years, \$3.40, \$3.30 and \$3.20 for twenty-five cases. I think very likely there was a

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special price for ten cases, but I am not positive about that.

Q. What about 1916 down to date.

(Objected to; objection overruled; exception note.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its forty-fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(121) A. The same.

Q. And in 1917, down to the date of the trial.

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its forty-fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. The same.

In answer to subsequent questions the witness testified: In February, 1914, we were cut off. Down to the time of the filing of the suit we were having continued demands for Old Dutch Cleanser from our customers.

Q. Just give us some idea about the demands you were having for it. A. I could not give you an idea of the quantity; all the salesmen in the place were constantly after me to try to get it for them. We were losing trade and could not fill orders.

Mr. MONTAGUE: On matters of this kind, your Honor, it is very important for us to know what demand he had, and if he says he had "a lot of them", that does not help us a bit because it is too indefinite.

The COURT: I do not suppose he can tell you any more than that.

Mr. MONTAGUE: But we could not be penalized for the fact that he keeps no record.

Mr. BAKER: I object to that statement, if the Court pleases.

Mr. MONTAGUE: I object to the question on the ground that it is indefinite in form and that the defendant, for the purposes of cross-examination, is entitled to a specific statement.

The COURT: As I understand it, Mr. Frey did not keep a record of that. His present impression is that there was a great deal of demand for it, the precise quantity of the demand he has no means of telling you. Now we can talk for a week and I do not suppose he would say any more than that. Isn't that true?

The WITNESS: Yes, that is true. My men will be here to corroborate that.

Mr. MONTAGUE: I move to strike out the answer which I objected to.

(Motion overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now (123) prays the Court to sign and seal this its forty-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: When we bought from the Cudahy Packing Company the freight was either prepaid by them, or, in most cases, it was delivered right from the stock they carried in the storage warehouse here in Baltimore.

The COURT: When you sold at \$3.20 to a retailer in Virginia, who paid the freight?

The WITNESS: We never sold at \$3.20, your Honor, it was \$3.40.

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The COURT: I thought you said sold twenty-five cases to some one down there.

The WITNESS: That was to a man in Philadelphia.

The COURT: But I thought, without cutting prices, that whenever you did supply a retailer you sold him at \$3.20.

The WITNESS: He would pay the freight if we shipped it; an order like that would be a very exceptional thing. I do not think we ever sold twenty-five cases to one man.

In answer to subsequent questions the witness testified: The ordinary quantity we sold was usually one case at a time, f. o. b. Baltimore, he paid the freight. I do not think we would sell more than one or two five-case lots in a year, if we sold that many. The biggest sale we sold was the three cases shown on this memorandum, and that was to a very large retailer.

Q. In giving the net and gross profit this morning, you did not give the exact per cent; have you any book from which you can give the exact per cent? A. I would have to figure it out.

Q. Give us the amount so that we can make out the exact per cent.

(124) (Objected to.)

The COURT: I think there is no use in putting that in at all. He has proved that he never got less than \$3.15 for his Dutch Cleanser, sometimes he sold for \$3.40, and I do not think you need go very much into the net and gross profit of his general line of business.

Mr. BAKER: I only asked the question so as to get the per cent of the cost, so that we would have it before us.

The COURT: We know that already. We have the volume of business done each year and the cost of doing that business and he has told us what is the minimum and maximum profit in gross that he made on Old Dutch Cleanser and he has told us that it added nothing to his cost or very little to his cost to sell six or seven thousand dollars' worth of Dutch Cleanser a year. Now you have all the facts, I think, and if you complicate it by

putting in these percentages it will not add to the sum of our knowledge.

Q. In your letter of February 5, 1914, you make the statement that "if you have any form of affidavit concerning the price maintenance feature of your selling contract, I will be pleased to sign the same." What did you mean by that?

Mr. MONTAGUE: I object to that. If he can tell what he refers to, all right.

(Objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its forty-seventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(125) A. I referred to the fact that if they wanted a contract that we would maintain the price of Old Dutch Cleanser I would give it to them.

In answer to subsequent questions, the witness testified: In Plaintiff's Exhibit No. 5 I made the statement, "I have repeatedly advised your representatives when calling upon us of our position in this matter and have also asked them if they secured anything definite to advise me of it and I would be pleased to take such steps as would prevent any further continuance." I meant by that that I wanted the price of Old Dutch Cleanser maintained up to that time and if they had any evidence that any one in our employ had cut the price of it, that we would punish the offender, handle him in any way that seemed best to us, and we would see that it was not repeated. Up to that time I had kept the price on Old Dutch Cleanser; to the best of my knowledge it had not been cut. I had only cut it once myself and that was a matter of courtesy to another jobber.

Q. Except in the instance where your salesman had

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made the cut? A. After this trouble arose I found that it was being cut in a few cases.

CROSS EXAMINATION.

By Mr. MONTAGUE:

The WITNESS: In my letter to Cudahy Packing Company of November 13, 1914, which is Plaintiff's Exhibit No. 18, I say, "We have now been off of your distributing list for about a year." By distributing list I mean wholesale grocers to whom Cudahy Packing Company sold Old Dutch Cleanser. I recognized here the distinction the Company made between being on and off the distributing list. I knew I was not on the Company's direct buying list. These prices which I have been quoting as the prices at which the Cudahy Packing Company sold to people who were on its distributing list were, so (126) far as I know, given by Cudahy only to wholesalers who were on that list.

Q. And every one else, whether he was a wholesaler or retailer, who was not on the list was, to your knowledge, quoted by Cudahy at the other price? A. I have no knowledge of that. A wholesale grocer I knew was buying—

Mr. MONTAGUE: I object to that.

The COURT: Let him finish his answer.

The WITNESS: Every wholesale grocer I knew was buying direct except myself, so I had no knowledge of any other prices quoted.

(Motion by Mr. Montague to strike out answer; motion overruled; exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, and permitting the witness to answer the defendant excepted, and now prays the court to sign and seal this its forty-eighty bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

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Q. You know of no prices except first prices to the distributing agents and those other prices, do you? A. I only know of two sets of prices; I can not quite answer it in that way, Mr. Montague. I never knew the prices in the way you are asking it.

Mr. MONTAGUE: I submit that when I ask a question, your Honor, which can be answered yes or not, that the witness should answer it in that way.

The COURT: If there is a question that can be answered yes or no, Mr. Frey, answer it in that way and then add whatever explanation you think would make it clear.

(127) The WITNESS: When I spoke of being off the distributing agent's list from February 3d up to the time when we brought this action, I meant that we were not granted this distributing agent's price by Cudahy from that time up to the time when we began the suit. Cudahy would not sell at that price. Since we received the letter from the Cudahy Packing Company to us dated February 4, 1914 (Plaintiff's Exhibit No. 2), there has not been any change in their attitude so far as I know. That letter states their attitude to us so far as I know from that time until today. So that throughout that period they have been willing to sell us always at the rate of \$3.20 per case less two per cent off for cash, so far as I know. In my conversation with Mr. Carson, which occurred in February, 1914, Mr. Carson discussed with me our relations with the Company; Mr. Carson did not say anything at all which is at all inconsistent with the statements contained in the letter of the Company to us of February 4, 1914.

Q. So when you stated that Mr. Carson said that he could not supply you with any goods, you want that qualified by the statement that he could supply you with goods only at this price of \$3.20 per case less 2 per cent for cash? A. Yes. Of course I told him that that would not interest me, I could not afford to buy at that price.

Mr. MONTAGUE: I move to strike out the latter part of the answer of the witness.

(Motion overruled; exception noted.)

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To the overruling of the defendant's motion aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its forty-ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. You testified to a conversation which you had with Mr. Philp in 1913, in which Mr. Philp said that you could sell only at retail prices; are you positive that he used the phrase "retail prices"? A. I said in my testimony it was either Mr. Philp or Mr. Berry.

Q. Whichever it was, did he use the phrase "retail (129) prices"? A. He told me distinctly at that time—

Q. Did he use the phrase "retail prices" or did he use the phrase "General sales prices"? A. He said that he had knowledge that I was selling—

Mr. MONTAGUE: I move to strike out the answer and that the witness be instructed to answer the question. I merely asked whether Mr. Philp or Mr. Berry used the phrase "retail prices" or "general sales prices"?

The COURT: If you remember, Mr. Frey, which particular phrase was it?

The WITNESS: He did not use either phrase. That is my language there.

The COURT: Tell us as nearly as you can what he did say.

The WITNESS: I could not remember his exact words. What he told me was that he had knowledge that I was selling to another wholesaler at less than the price at which I was supposed to sell it.

Q. (By Mr. MONTAGUE) Did he characterize that price as retail price or as general sales price, or don't you remember? A. That is too far back for me to remember. When I testified that he said that we should sell only at the retail price, that is my language and not his. That is what he told me in substance placed in my language.

Q. Do you recall putting out a statement before you

commenced this suit in which you stated to the world your purpose in beginning it?

(Objected to.)

The COURT: I will let him answer that question one way or the other.

The WITNESS: I do not recall whether they went out before I began the suit or afterward. I have written (130) several articles on the subject of price maintenance. I wrote one article for the Journal of Commerce in reply to their request on the subject of price maintenance. I might have given an interview to some one as to why we were beginning these suits; as to whether those things took place before or afterwards I could not say.

The COURT: I would like counsel to point out to me here at the desk what it is that he wants to open up in that line. I can conceive that there are some things that would be admissible, but there are other things that would not.

Q. (By Mr. MONTAGUE) I hand you a clipping pasted to a sheet and ask you if that is the article or interview which you furnished the Journal of Commerce to which you have just referred? A. I wrote it, yes.

Q. Do you recall whether this was before or after you had commenced this suit? A. If I can refer to my copies of those letters I can tell you. I can not recall it from memory.

The COURT: Do you know the date of it?

Mr. MONTAGUE: May 7, 1915.

Mr. SMITH: Suit was instituted May 12, 1915, but it was in course of preparation for the matter of a couple of months before that.

The COURT: Then it was substantially at the time the suit was brought.

Mr. MONTAGUE: Just preceding it. I think the contents of it would bring back to his recollection whether it was before or after.

The COURT: It appears from the face of it. It says here "Suits to be filed in Federal Court."

Q. Is the suit against the Cudahy Packing Com-

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pany which you refer to in this article the present suit?
(131) A. Yes.

Q. Did you discuss the question of price maintenance in this article? A. I can not recall now.

Q. Glance through the article and tell us.

The COURT: I will say here that it is immaterial under the rulings of the Circuit Court of Appeals in this Circuit what this gentleman thinks about price cutting, or what he thought about price cutting or price making in 1915, or now.

Mr. MONTAGUE: What he thinks of price maintenance is absolutely immaterial, yes, but his purpose in bringing this suit is very material.

The COURT: I understand you to say that you agree with me that what this man thought about the ethics of price cutting is immaterial?

Mr. MONTAGUE: Yes, but I have asked him if he discussed the question of price cutting.

Mr. SMITH: Then we object to it.

(Objection sustained; exception noted.)

Q. (By Mr. MONTAGUE) Does this correctly state (132) your purpose at the time you brought this suit? "We feel, however, that nothing in the cases so far has brought forth a final decision from the courts of law fully deciding the question of the manufacturers' and jobbers' rights in this matter, but we sincerely trust that the actions which we are now bringing will result in such final decisions." Was that your purpose in bringing the beginning of this suit?

(Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its fifty-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. "It is our purpose, in case we lose in the lower courts, to carry these actions through to the higher court, and no doubt this will also be done by the other parties in the event of our winning in the lower courts." So far as that refers to you, does that state your purpose in the beginning of this suit?

(Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its fifty-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

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The COURT: I sustain the objection on the ground that the motives are not generally material, but if so I know of no better motive of any man than to vindicate the law by bringing a matter of the kind to the decision of the courts. Hampden has long been held as a model of a patriot for doing that very thing.

Mr. MONTAGUE: But why counsel should object to having this—

The COURT: I object to the wasting of the time because it can not possible interest the jury for one moment. He must stand on his rights. What is the proof of the case? If he proves that you have damaged him and proves the amount of that damage it does not make any difference what his motives were in bringing the suit.

Mr. MONTAGUE: But it does make a difference—

The COURT: I have ruled.

(Exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its fifty-second bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as

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if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. MONTAGUE: But, your Honor, I have a right to indicate clearly my purpose in asking for this line of examination. He has attempted to prove damages. I wish (134) to show by this article that his chief purpose in bringing this suit was to establish what he regards as a proposition of law. It becomes material to him and to this jury as to whether it was not rather more important for him, by his own profession, to win out on this suit in some way or other, than to get any damages from us, and therefore when he claims that the damages which he suffered really did hurt him, the greatest benefit he derived was from the notoriety and fame in connection with this suit.

The COURT: The last statement is, so far as anything that has been indicated by counsel is concerned, entirely unjustified and is highly improper.

Mr. MONTAGUE: I take exception to your Honor's statement.

To the statement of the Court aforesaid, to which exception was noted, the defendant excepted, and now prays the court to sign and seal this its fifty-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. (By Mr. MONTAGUE) Does this represent the attitude which you had when you began the suit: "We have no quarrel with manufacturers who attempt to fix the resale price on their products?"—

(Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid (135) said, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its fifty-fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and pur-

poses as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. Does this state your views—

Mr. SMITH: If you Honor pleases, it does not strike me as being fair for counsel, in the face of the fact that the Court is ruling out the proposition, to persist in reading piece by piece isolated parts of that article and in that way have a proposition go to the jury which your Honor and counsel for the plaintiff think is improper.

The COURT: I am not going to stop him from doing it. My judgment is that counsel seldom, with juries, advantage themselves by doing anything that is improper.

Mr. MONTAGUE: I take exception to your Honor's statement and on the strength of it I ask for the withdrawal of a juror and declaration of mistrial.

To the statement of the Court aforesaid, to which exception was noted, the defendant excepted, and now prays the court to sign and seal this its fifty-fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as it prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(136) The COURT: I overrule your motion. I say to persist in reading notations of that character, if it be done as counsel for plaintiff suggests, is an improper matter. I do not pass upon whether, in this instance, it is proper or not. The jury sees it as well as I do, and it is the jury that usually visits the penalty.

Mr. MONTAGUE: I also take exception to that statement.

To the statement of the Court aforesaid, to which exception was noted, the defendant excepted, and now prays the court to sign and seal this its fifty-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

WALTER A. FREY.

The COURT: Proceed with the case.

Mr. MONTAGUE: On the strength of your Honor's last statement I ask leave to withdraw a juror and the declaration of a mistrial.

The COURT: Refused, refused. Proceed with the case.

(Exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, the defendant excepted, and now prays the court to sign and seal this its fifty-seventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. (By Mr. MONTAGUE) I ask you if this is the correct copy of the article or statement which you gave to the Journal of Commerce?

(Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its fifty-eighth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. MONTAGUE: I now offer in evidence for the purpose which has already been stated the paper which the witness has heretofore referred to as the statement which he has given to the Journal of Commerce.

(Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and excluding the paper aforesaid, the defendant excepted, and now prays the court to sign and seal this its fifty-ninth bill of ex-

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ceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial (138) of this case.

JOHN C. ROSE, Judge. (Seal)

(Paper referred to, having been offered for identification only, was marked by the stenographer, "Defendant's Exhibit, Identification A"), which is as follows:

DEFENDANT'S EXHIBIT IDENTIFICATION "A."

BALTIMORE JOBBER TO TEST PRICE FIXING

Frey & Son, Inc., will seek Final Court decision.

Suits to be filed in Federal Court against Cudahy Packing Co., and Welch Grape Juice Co. to Establish
Manufacturers' and Jobbers' Respective
Common Law Rights.

Frey & Son, Inc., wholesale grocers of Baltimore, Md., have given notice that they will soon institute action in the Federal courts to bring to a final decision the question which has been agitated for the past few years in many lines of trade involving the common law rights of manufacturers to enforce fixed resale prices on their products and in so doing to refuse to sell their goods to the jobber who declines to follow their policy. The suits will be filed by the Frey corporation in the courts at Baltimore in the near future, and the defendants to the actions, which are to be carried to the highest courts of the country for final decision, it is stated, will be the Cudahy Packing Company of Chicago, and the Welch Grape Juice Company.

The following statement on the test suits was received by this newspaper yesterday from the Frey company:
(139) "The two suits which are about to institute in

WALTER A. FREY,

the United States District Court will be against the Cudahy Packing Company and the Welch Grape Juice Company and the declarations are now being prepared by our attorneys, Messrs. D. W. Baker, of Washington, D. C., and Horace T. Smith of this city.

"These suits are based on the fact that these concerns refuse to sell us their products, owing to the fact that they claim that we did not maintain the price which they fix as a selling price on their products. We have been deeply interested in the discussions in your columns concerning the 'price maintenance' matter and read with particular interest the article from the Macy Company, which we consider a very plain explanation of the reasons why it is necessary and desirable for large concerns doing a cash business to sell their goods at a lower price than is being done by concerns doing business on a different basis.

WANT A FINAL DECISION ON THE ISSUE.

"We feel, however, that nothing in the cases so far have brought forth a final decision from the courts of lawfully deciding the question of the manufacturers' and jobbers' rights in this matter, but we sincerely trust that the actions which we are now bringing will result in such final decisions, as it is our purpose, in case we lose in the lower courts, to carry these actions through to the higher court, and no doubt this will also be done by the other parties in the event of our winning in the lower courts. We have no quarrel with manufacturers who attempt to fix the resale price on their products, but, on the contrary, if the courts of law decide that they have the right to refuse to sell their products to the jobber who refuses to follow their policy we will give them our cordial support and maintain their resale price. But we will then also insist that every jobber be compelled to live up to the agreements and will do all in our power to bring to the attention of the manufacturers those jobbers who secretly violate their agreements. (140) "We ourselves are thoroughly opposed to the policy of 'price maintenance'; we do not think that there is anything right in it, and, if upheld, places a power in the hands of the manufacturer which he should not have. It gives him the power to restrict the territory in which the jobber can do business, and if generally followed

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by manufacturers would drive the big jobbers out of business and make impossible the building up of large jobbing houses unless such houses would desire to become direct competitors of manufacturers by pushing other brands packed by themselves or for them. The basis of most of the manufacturers' arguments are on the grounds that if the jobbers do not maintain the resale price the articles soon become unpopular with the retail trade and results in the loss of business for the manufacturers. We cannot feel that there is anything in this argument, for we have only to look around us and find article after article becoming more and more popular sellers every day and on which the manufacturers do not attempt to maintain the resale price. We refer particularly to such articles as Quaker Oats, Gold Medal and Pillsburg Flour, Magnolia Milk, Walter Baker's Cocoas and Chocolates, Pet Milk and numerous other items well known to the grocery trade.

TO CLEAR UP MANUFACTURER'S RIGHTS.

"We do sell lots of articles at the price the manufacturer asks us to; not because we have entered into any agreement to do so, nor through fear of the manufacturer should we sell them at another price, but simply because the price at which the manufacturer has asked us to sell, is about the price which we would sell these goods at even though the manufacturer had not taken up the resale price with us at all, and because we do not find the competition causes us to sell at any lower price and the price shows us our proper margin of profit.

"We believe the business atmosphere will be much cleared by a final decision of the legal points on this subject. Some manufacturers attempt to enforce the 'Price (141) maintenance' features of their policy while others merely make a bluff at it and do nothing when an actual instance of their goods being sold at a lower price than named by them is brought to their attention. This is no doubt due to their uncertainty as to their real legal rights under the present laws. We ourselves feel that that the jobber who can so systematize his business so as to conduct it on a lower percentage of cost than competitors, should have the right to offer his goods for sale at a correspondingly lower price to his trade, thus building up a larger business and putting the goods into the

WALTER A. FREY.

hands of the retailer and consumer at the lowest possible price.

RETAILERS AND JOBBERS HAVE RIGHTS.

"Lots of things enter into the subject of 'cost of doing business'. Such things as 'cash or credit business', doing business by 'mail or through salesmen', 'elaborate systems of the cutting out of red tape,' 'selling goods f. o. b. warehouse or sidewalk delivery,' all making a vast difference in cost, according as the jobber follows the one system or the other.

"Is it not reasonable to suppose that the retailer buying for cash through the mail should expect to receive his goods at a lower price than the one who buys on long credit terms from salesmen? Likewise, should not the city retailer expect to receive an allowance if he buys his goods for cash and hauls them himself instead of buying them through a salesman on long credit terms and has them delivered by the jobbers' wagon?"

Q. (By Mr. MONTAGUE) In Plaintiff's Exhibit No. 7, being your letter to Mr. Strauss of February 26, 1914, there is contained this statement: "We are today turning all the papers in this matter over to United States District Attorney to ascertain exactly what our rights in the premises are, also, of course, giving them your published jobber prices and the correspondence we have had on the subject." Was that a true statement?

(142) (Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its sixtieth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. Did you, in fact, turn over the papers to the District Attorney's as you have here stated?

(Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the courts to sign and seal this its sixty-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. Did you ever make any statement to the trade to the effect that you were trying to make trouble for the Cudahy Packing Company with the United States Government on this account? A. I never made any statement to the trade that I was trying to make trouble for the Cudahy Packing Company; I may have advised the trade by word of mouth, or even in some of my circulars, that I had the matter up with the Department of Justice. (143) Q. And it was a fact that you did have it up with them, is it not? A. I certainly did.

Q. Has the Department of Justice, so far as you know, prosecuted any indictment against the Cudahy Packing Company on account of your complaint?

(Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its sixty-second bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: This question, gentlemen, must be determined by what the law and the facts produced here are and not by anything that the Department of Justice did or did not do. So far as all those questions go, except in so far as they reflect upon the credibility of this witness, they are utterly immaterial.

WALTER A. FREY.

The WITNESS: I circulated that paper.

(Paper referred to, having been offered in evidence, was marked "Defendant's Exhibit B".)

Mr. MONTAGUE (Reading): "We are glad to fight for low prices for the retailer. We have just been notified by the Cudahy Packing Company that they will not sell us at regular jobbers prices. They make Old Dutch Cleanser. This is another instance of the jealousy of the high-priced jobbers who try to have us cut off whenever possible."

The WITNESS: I did not refer to any high-priced jobber in particular in that statement. All of them as a class I refer to. I did not have any jobber in mind at all, no particular jobber. I had all the Baltimore jobbers in mind.

Q. "We welcome all the fights they want to bring. The retailer is realizing more and more that this house is his greatest friend. We realize that the success of the retail grocer means our success, and the retailers are supporting us more and more daily as proven by our enormous increase in sales. Keep all prices confidential. Why do you play into the hands of our competitors by showing our invoices and telling them what you pay us for your goods. Remember you are the one who suffers if the prices are raised on you. And remember that if it weren't for Frey you would pay much more for your goods than you do. Now don't worry about Old (145) Dutch Cleanser. We have lots of it and can supply you regularly. Send your orders to Frey and you help yourself to make a greater success of your business." Did you have lots of Old Dutch Cleanser at that time? A. We did not, but we did not anticipate any trouble in getting any. When I said, "We have lots of it and can supply you regularly" I meant that I hoped that we would have lots of it.

Q. Do you recall about what time you were circulating this (handing paper to witness)? A. February 25, 1914.

Q. Was that before or after your correspondence with the Cudahy Packing Company of February 3d and 4th? A. I might correct that statement of mine a min-

ute ago. We still had Old Dutch yet at the time that went out.

Q. Did you have lots of it? A. We had a fair stock of it.

Q. Well, did you have lots of it? A. I would not call it lots of it exactly.

Q. Then this statement was incorrect, then, to that extent? A. It would depend on what you would consider lots.

Q. Depending on what you consider lots, you did not have lots, did you? A. No, we did not have lots of it.

The WITNESS: This paper which you now hand me was a paper which we circulated on or about April 12, 1915, being one of our catalogues.

Mr. MONTAGUE: I offer that in evidence. I offer the first page, the page before where it subdivides into columns. I will make a full offer, and then get it and read it later. I offer the running line at the top of the page, over the column 13, and then I will offer the matter contained in column 32. I do not read all of this at the time.

(146) (Paper referred to by counsel, having been offered in evidence, was marked Defendant's Exhibit C), the parts offered in evidence being as follows:

DEFENDANT'S EXHIBIT "C."

THE BIG FIGHT

WILL SOON BEGIN.

Can the manufacturer dictate to the jobber the price at which he must sell his goods.

Cannot the jobber who is enabled to do business at a lower cost than his competitors by reason of his ability to systematize his business, save heavy expenses, avoid bad debts, and in numerous other ways which are *OUR SECRET*, offer his goods to his trade at a correspondingly *LOWER PRICE* than his competitor. We believe he should.

THE CUDAHY PACKING CO., manufacturers of **OLD DUTCH CLEANSER**, and the **WELCH GRAPE JUICE CO.**, manufacturers of **WELCH GRAPE**

[illegible][illegible]

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[illegible]

CANNED GOODS DEPARTMENT

	For Dose
Asparagus, see California canned fruits	
Baked Beans, Standard, No. 1 Plain, 4 doz.	37
do case	37
Baked Beans, Standard, No. 1 Season, 4 doz.	37
do case	37
Baked Beans, Standard, No. 3 Season, 2 doz.	56
do case	56
Baked Beans, Standard, No. 3 Season, 2 doz.	70
do case	70
Baked Beans, Campbell's, 2 doz.	92½
Baked Beans, M. Warner's Dog's Head, No. 1 Plain, 2 doz.	46
do case	46
Baked Beans, M. Warner's Dog's Head, No. 1 Season, 4 doz.	46
do case	46
Peas, Bow Shore, No. 2 Early June, 2 doz.	40
do case	40
Peas Capital Sifted, No. 2, Early June, 2 doz.	3
do case	16
Peas, Extra Sifted, 2 doz.	16
Peas, Little Fists, 2 doz.	16
do case	16
Pumpkins, No. 2, 2 doz.	55
do case	55
Squashes, No. 2, 2 doz.	56
do case	56
Succotash, No. 2, 2 doz.	90
do case	90
Squash, Fancy Dry, No. 2, 2 doz.	90
do case	90
Sweet Potatoes, No. 2, 2 doz.	70
do case	70
Sauces, Ketchup, No. 2, 2 doz.	94
do case	94
Others, No. 2, 2 doz.	85
do case	85
Others, No. 2, 2 doz.	10
do case	10
Others and Tomatoes, No. 2, 2 doz.	100
do case	100
Others and Tomatoes, No. 2, 2 doz.	100
do case	100

CONDENSED MILK

Gail Borden
EAGLE
BRAND
CONDENSED
MILK
THE ORIGINAL

Per Osm

TALL, \$8.20.

3 doz. to case	1 00
Corn, Balls Flat Shoe Pat., 2 doz. to case	67½
Corn, Morning Star Shoe Pat., Rose Farm No. 2, 3 doz. to case	88
Competition-Corn and Tomatoes, No. 2, 3 doz. to case	77½
FIRST PRIZE Vegetables, No. 2, 3 doz. to case	86
Tomatoes No. 1 Standard, 4 doz. to case	40
Tomatoes No. 2 Standard, 4 doz. to case	54
Tomatoes, No. 1 Fancy, 2 doz. to case	57½
Tomatoes, No. 2 Standard, 2 doz. to case	70
Tomatoes, No. 1 Fancy, 2 doz. to case	75
Tomatoes, No. 2 Standard, ½ doz. to case	
CALIFORNIA CANNED FRUITS	
"Golden West", Yellow Cling Peaches, 2 doz. to case, per doz.	1 30
"Tri-Color" Lemon Cling Peaches, 2 doz. to case, per doz.	1 50
"Hermes" Lemon Cling Peaches, 2 doz. to case, per doz.	1 60
Mission Inn, Lemon Cling Peaches, 2 doz. to case, per doz.	1 60
"Gorham", Peas, 2 doz. to case, per doz.	1 05
"Camryn", Peas, 2 doz. to case, per doz.	1 45
"Green Banner" Plums, 2 doz. to case per doz.	1 80
"Ambassador" Royal Anna Cherries, 4 doz. to case, per doz.	2 20

EVAPORATED MILK

Being located in the very centre of the canning section, we are always in a position to offer you particularly good bargains in this line. This is best evidenced by our large canned goods business which is constantly growing.

WALTER A. FREY.

JUICE, have both been refusing to supply us with goods, because we don't sell at the prices set by them.

We have placed the matter in the hands of our ATTORNEYS and SUIT WILL BE INSTITUTED IN THE UNITED STATES COURT within a short time to decide this question.

WE ARE FIGHTING YOUR BATTLES for lower prices.

If we win, you gain more than we do. If we lose, we have heavy Court expenses to pay. But we are willing to make the fight for you.

Now show us that you want us to do it by giving us your support.

SEND US YOUR ORDERS.

That is the most positive proof that our action meets with your approval.

WE ARE IN THE FIGHT TO WIN and we believe we are going to win for we feel we are in the right, both (147) legally and morally, and with your support we will push the fight to such a definite conclusion that our right to *SELL YOU AT LOW PRICES* will never again be questioned.

(150) Q. "The big fight will soon begin. Can the manufacturer dictate to the jobber the price at which he must sell his goods"? You recall that statement, don't you, Mr. Frey? A. If it is in there, I do not recall it now, but if it is in there, I wrote it.

Q. Was that good publicity for your business?

(Objected to.)

The COURT: Sustained.

Mr. MONTAGUE: We note an exception.

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its sixty-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. Did it hurt your business to proclaim in your advertising that you had begun a suit, or were about to begin suit against the Cudahy Packing Company?

Mr. BAKER: Objected to.

The COURT: Objection sustained.

Mr. MONTAGUE: Exception noted.

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its sixty-fifth bill of exceptions; which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. "Can not the jobber who is enabled to do business at a lower cost than his competitors by reason of his

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ability to systematize his business, save heavy expenses, avoid bad debts and in numerous other ways which are our secret, offer his goods to his trade at a correspondingly lower price than his competitor. We believe he should. The Cudahy Packing Company, manufacturers of Old Dutch Cleanser, and the Welch Grape Juice Company, manufacturers of Welch Grape Juice, have both been refusing to supply us with goods because we don't sell at the prices set by them." Do you recall that statement, Mr. Frey? A. If that is in there, I wrote it.

Q. Was that statement correct, in so far as it says that the Cudahy Packing Company was refusing to supply you with goods, or should it be qualified with the statement that they were always willing to sell you goods at \$3.20 per case? A. Their offer to sell me at \$3.20 a case was practically refusing me all supplies for jobbing purposes.

Q. When you say refusing to sell you goods, you mean offering to sell you goods at \$3.20 per case, is that what you mean? A. They were doing so.

(152) Q. They were offering to sell you goods? A. Their offer to do so was refusing me supplies altogether.

Q. And then, your statement, this phrase I have read, should be qualified to explained by that statement, shouldn't it? A. It should not, no, sir.

Q. As it stands there the statement must be read with the qualification that they were offering to sell you at \$3.20 must it not? A. I would not think of putting a thing like that into it.

The COURT: It is simply this, in his view, right or wrong, the Cudahy people, when they offered to sell at \$3.20 knew that would not interest him, and he could not buy goods at that price. That has already been explained.

Q. "We have placed the matter in the hands of our attorneys and suit will be instituted in the United States Court within a short time to decide this question." Is the suit you refer to this present suit?

The WITNESS: It is.

Q. "We are fighting your battles for lower prices. If we win, you gain more than we do. If we lose, we

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have heavy court expenses to pay." Is that a correct statement? A. Absolutely.

Q. If you lose, you do have the court expenses to pay, is not that the fact?

The COURT: I guess they know that.

Mr. BAKER: Yes.

The WITNESS: I presume so.

Q. Are all the expenses connected with this litigation being paid by you?

Mr. BAKER: We object.

(153) A. I do not see any other point except—

Q. Now, you said, "If we lose, we have heavy court expenses to pay." I simply want to know if they are all the expenses of this litigation. A. It don't say that.

A. I ask you if that is it.

The COURT: What is the suggestion of it? What is the suggestion there, Mr. Montague, that he is acting for some society or organization conducting the suit? Is that it? Is that the suggestion?

Mr. MONTAGUE: He is standing here in the pose of a patriot, posing in the community as a man going to heavy expenses, and posing as a patriot for—

The COURT: I am not trying this case on patriotism any more than I am trying Colonel Bowie there. It is a matter you are bringing in yourself, into the case, and he is not claiming any patriotism so far as I know.

The COURT: I mean before the jury. He may choose to do anything he wishes outside of this court room, but I must keep out such false issues as far as I can. I do not know what you mean by asking him if he is paying the Court expenses.

Mr. MONTAGUE: It will depend on what his answer is whether I think he is acting for a society or not, your Honor.

The COURT: Well, if there is no objection, answer the question.

Mr. MONTAGUE: It goes into the whole question of damages.

Mr. BAKER: If it goes into the question of damages I object.

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THE COURT: It goes not one whit into the question of damages, gentlemen. You can not give Mr. Frey one single penny other than as compensation except in so far as there is a three time increase provided by law. (154) You can not give Mr. Frey one penny here for the sake of vindicating any cause whatever. You cannot give him one cent, except that which compensates him, and this automatic triple increase. You can not give him one cent as smart money against these defendants. They can not be made to pay a single cent of that kind, and you can not properly give him one single penny less than you find he has suffered; and all questions of his motives as bearing on the question of damages are entirely beside the mark. The damages in this case are compensatory only. The jury are not entitled to give one cent more or one cent less than they find by the evidence is the actual amount of damages suffered, and it makes no difference what the motives of this man in bringing this suit were, whether good or bad, they can not be increased, no matter what they are, no matter how good or how bad they are, and the damages can not be diminished.

MR. MONTAGUE: I except to so much of your Honor's statement as informs the jury that the motives of this plaintiff in bringing this suit are not material.

To the statement of the Court aforesaid, to which exception (155) was noted, the defendant excepted, and now prays the court to sign and seal this its sixty-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

THE COURT: Not to the amount of the damages. So far as they bear on his credibility as a witness they may be material. But the point you just suggested as on the questions of damages, they are absolutely and in all circumstances, must be immaterial, because the damages are compensatory only and do not depend on motives.

MR. MONTAGUE: I take an exception to that.

To the statement of the Court aforesaid, to which

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exception was noted, the defendant excepted, and now prays the court to sign and seal this its sixty-seventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: Very well.

Mr. MONTAGUE: And the theory is that a man can not voluntarily go and hurt himself for the purpose of being allowed to display his scars in public.

The COURT: Mr. Montague, you may argue your case at a later stage.

(156) Mr. MONTAGUE: I just wanted to make sure your Honor understood the point.

The COURT: I understood the point, and I can not quite see where what he said in the paper you are reading from, in 1915, can possibly have any bearing on hurting himself in February of 1914. The only damages the jury can compensate for are damages that have already been done. It does not affect the question of damages at all. They must only be compensatory. They can not be increased one way or another.

Q. "We are in the fight to win and we believe we are going to win for we feel we are in the right, both legally and morally, and with your support we will push the fight to such a definite conclusion that our right to sell you at low prices will never again be questioned." Did you receive an increased amount of business after that was put out, or a decreased amount of business?

Mr. BAKER: I object.

The COURT: The question has been already answered. Therefore, there is no real objection to it. He got sixteen hundred thousand dollars' worth of business, I think he testified, in 1914, seventeen hundred thousand in 1915, and eighteen hundred thousand in 1916. You have gotten that fact out already.

The WITNESS: I—

Mr. BAKER: Wait a minute, Mr. Frey, do not answer any questions unless asked.

Mr. MONTAGUE: If the witness will adopt that as his answer, that will satisfy me.

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MR. MONTAGUE: I offer this in evidence.

MR. BAKER: This is June 5, 1915, after the suit is brought?

MR. MONTAGUE: Yes, sir.

(Paper referred to, having been offered in evidence, was marked "Defendant's Exhibit D".)

(157) MR. MONTAGUE: Reads from Defendant's Exhibit "D", being a price card of Frey & Co.

Q. "You know the legal fight for low prices has begun. We have entered suits against the Old Dutch Cleanser people and the Welch Grape Juice Company, to see if they have the right to make us charge you more for goods than we want to, and refuse to supply us if we refuse to overcharge you. The retailer grocer who pays \$3.40 less two per cent for Old Dutch Cleanser when he hauls it himself and pays cash for it is being greatly overcharged. How we wish we could make that much profit on our goods. We would not stay in business but a few years, for we would be rich by that time. And the same thing applies to grape juice when you pay the price you do for it. This is your fight. If we win you will reap the greatest benefit from it. If we lose, Heaven help you, for then the manufacturers of branded articles will put the screws down hard. But we don't think we can lose. We believe we are right and that the law is on our side. We are going to heavy expense to make the fight for you and have the courts decide if we can sell you at the prices you ought to buy at. We want your support and we feel confident we are going to get it. If you want to know more about these cases, come down and talk them over." How many cases did you ever sell of Dutch Cleanser at less than \$3.40 a case?

A. I told you already in my testimony that I sold very little, very little less than \$3.40. That circular is three years after I got it. When I printed that circular \$3.40 was too much. I could have bought Old Dutch Cleanser from the Cudahy Packing Company at that time by handling it in my cash department where that circular went out. I could very easily have afforded to sell it to them at less than \$3.40. We never sold any Old Dutch Cleanser at less than \$3.40, except in those cases in which I told you in my answer to Mr. Baker. I could not tell

(158) you the exact date it came to my mind that \$3.40 was too high. It is pretty hard to fix the date on that? It was before February 3, 1914, that I thought they were overcharged.

Q. I call your attention to Plaintiff's Exhibit No. 5, being your letter to the Cudahy Packing Company dated February 14, 1914, and I will read you this extract from it: "The action taken by you in your letter of the 4th"—that is where they quoted you a \$3.20 price—"would be one of the very best boosts for me, if I desired to make use of it through our trade, but I have no desire at all to go into the market to demoralize the price of your goods, as that is not our policy of doing business, but, on the other hand, our policy has always been, and still is, to cooperate with the manufacturers". Was that or was that not true? A. That was true, but when you would not give me the stuff I lost the desire to cooperate with the Cudahy Packing Company, and I went out and published the other articles, I experienced a change of heart. The action taken on February 4th by the Cudahy Packing Company when they quoted \$3.20 was not one of the very best boosts for our business. That action did not prove to be a boost—could not be in any way. I made use of it through my trade, and those various circulars of mine which you have read are examples of where I did make use of it.

Q. On February 14th you wrote to the Cudahy Packing Company: "I have no desire at all to go into the market to demoralize the price of your goods." How long did you continue in that opinion? A. Well, I do not think—I can not give you exact dates. You have the circulars, no doubt, where I first began to notify the trade of what you were doing. I had a change of heart on that too, certainly. It would be pretty hard to tell you when my conversion occurred. I don't keep a record of the dates.

Mr. MONTAGUE: I offer in evidence that portion of (159) this paper in large type at the bottom of it, running across the page. I do not think there is anything except that part (indicating).

Mr. BAKER: We object to this.

The COURT: I sustain the objection. And the only

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questions are those where there is a confirmation containing resale price, and what the amount of damage is resulting directly from that.

Mr. MONTAGUE: I might urge, your Honor, that this bears out the statement which he made in his letter of February 14th, as to—

The COURT: Mr. Montague, my view is this, on that question, that if you do a thing which improperly in a specific way does a specific damage to a man, the fact that he is quick-witted enough and bright enough to get popular sympathy and help in the rest of his business because you have done him that wrongful thing does not affect the issue between you one bit, not the slightest.

Mr. MONTAGUE: I except to that statement, your Honor, in so far as it is calculated—

To the statement of the Court aforesaid, the defendant excepted as noted, and now prays the court to sign and seal this its sixty-eighth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: (Interrupting last preceding exception by counsel): I do not rule on anything. I mean to say in answer to your question—I am not ruling on anything, except to state to you simply this—

Mr. MONTAGUE: I think you ought to add the statement (160) to the jury that that is not intended to characterize the act which is referred to as our act of February 4th. I want to make that very clear.

The COURT: Not at all. I mean to say if it turns out here—of course, if it does not turn out, he has not gotten any case, but if it turns out here that you are a party to a restraint of trade in violation of the Sherman Anti-Trust Act, for the sake of maintaining resale prices, and in consequence of being a party to that, and in furtherance of a combination you damage this particular plaintiff by refusing to let him sell at prices which he can resell your property, then the jury has to ascertain what is the direct damage resulting from that. That is to say, not the damage to his general business, but what

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profit he has lost by or in consequence of your action on Old Dutch Censor that he would otherwise have sold, at whatever profit the jury might find he would make, and that if he was quick witted enough and bright enough, and if the public opinion was such that his making the fight against you perhaps helped to advertise his business, that can not be taken into account in reducing the amount of damages that he could recover from you. That is not one of the ways of reducing damages that he has got to account for.

Mr. MONTAGUE: That, of course, shows just the line of differentiation between us, because if he does mitigate his own damages by any such methods—

The COURT: When Mr. Gordon Bennett, the editor, used to get his lickings, and then get out an extra edition of the Herald, describing how Bennett was licked again, that should be taken into account in affecting punitive damages he could recover, but it would not affect his right to recover his doctor's bill, and the cost of plasters and salves.

(161) Mr. MONTAGUE: I have to differ with you, your Honor. I will reserve my right by offering this, by having this marked in evidence for identification

(Paper referred to by counsel, having been offered in evidence, for identification, was marked "Defendant's Exhibit E, for Identification, purporting to be a special price list from Frey & Son, and the part offered by counsel reads as follows:

EXTRACT FROM DEFENDANT'S EXHIBIT "E" FOR IDENTIFICATION.

Who has always led the fight for Low Prices?

Who among all the Wholesalers, had the courage to go to Court to compel the Manufacturers to permit the Wholesalers to sell the Retailer at low prices?

Who pays all the expenses of the fight?

The Answer to all these questions is the same.

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(162) The COURT: I excluded that.

Mr. MONTAGUE: I take an exception.

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To the sustaining of the plaintiff's objection aforesaid, and excluding the paper aforesaid, the defendant excepted as noted, and now prays the court to sign and seal this its sixty ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. In Defendant's Exhibit C, which has been heretofore admitted in evidence on page 32 I notice an advertisement of Old Dutch Cleanser and the price. Did you have any old Dutch Cleanser on hand or in stock at that time, April 19, 1915? A. We did not have any in stock. These forms are set up in a plate, and we do not always take one little item out like that and go to the cost of a whole new plate. We leave it in there, and if a customer orders it—

The COURT: Mr. Frey, you had not had it for a number of months before.

The WITNESS: That is right.

From February 4, 1914, clear up to the time when we began this suit, we continued to advertise in our catalogue Old Dutch Cleanser as if we had it. I would not go to the cost of a new plate just to take the name out. I would write to the trade that we were unable to supply their wants, if they ordered it from us.

(163) The WITNESS: We were quoted three dollars and twenty cents by the Cudahy Packing Company on February 3, 1914, on Old Dutch Cleanser per case. We were accustomed at that time to sell that at \$3.40 per case. That would have given us twenty cents profit on Old Dutch Cleanser on the price as quoted by Cudahy. I testified yesterday that our gross percentage profit on sales in 1914 was six per cent.

Q. What percentage of \$3.20 is 20 cents? It is approximately six per cent, isn't it? A. I did not give that testimony yesterday on the cost price.

The COURT: That is correct, as he says, he did not, but it is rather immaterial; he gave the percentage on the selling price.

Mr. MONTAGUE: Which every way it is computed

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whether the cost price or selling price, it is substantially six per cent profit?

The COURT: Yes.

The WITNESS: In the year 1914, the quotation which we had from Cudahy on Old Dutch Cleanser was \$3.20 per case in 25-case lots and upward and throughout that period our price was \$3.40 when we sold it, so that this percentage of profit which we have referred to, obtained necessarily throughout that period and the same through the year 1916, but arriving at 6½ gross profit was not on the sales of that character of goods. We have to average up our prices to arrive at that, you know. But we did not sell any in 1916 except in that 25-case lot that I got.

Mr. MONTAGUE: In justice to myself, your Honor. I want to ask a question for information which I think will assist a good deal. It is very apparent, I am sure, that I am not familiar with what your practice is here. In the jurisdiction where I practice, on cross examination of a witness, the witness is generally held very closely to a direct answer without an explanation.

(164) The COURT: In this court it is universal that he may answer the question first and then explain his answer.

Mr. MONTAGUE: I just wanted to make sure about that.

The COURT: That is the universal practice here and it seems to me to be the fairest one, if we are trying to do justice and not to spar.

Mr. MONTAGUE: Your Honor having sat in New York perhaps knows that we have quite a different practice.

The COURT: I sat in equity there.

Mr. MONTAGUE: I know, but I say it merely to explain and to apologize for the interruptions which I have made because I have been used to a different procedure in that respect.

The COURT: I should explain this to you, perhaps, Mr. Montague. Of course there are times when a witness, is testifying about certain facts where I am obliged to enforce the rule that you are suggesting, but we are dealing with things here that do not seem to be very much in dispute.

Mr. MONTAGUE: I think I certainly owe, in view of

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that misapprehension on my part, an apology to you for the interruptions I made and to the witness also.

THE WITNESS: From February 3, 1914, up to the time when we commenced this action, it was \$3.20 per case that was being quoted to us right straight along and no other price was quoted to us by the Cudahy Company. The price which was being quoted to me before February 3, 1914, on the quantity I purchased, 250 case lots, was \$2.95 a case, and when I bought 700-case lots, it was \$2.92½ cents per case. I think the 100 case price was \$3. That is my recollection. I do not think I ever bought a 100-case lot, however. I think the smallest quantity that the Cudahy Company would sell a jobber was 25 or 50 cases and that would be \$3 too. This schedule of prices which I have just described, which I had before February 3, 1914, and the other schedule of price which they were quoting to me after February 3, 1914, were the (165) only two schedules of prices that I know of being quoted by Cudahy to anybody; that is they were the only two prices that were ever quoted to me, but Cudahy had other prices for different quantities. If I had wanted to buy less than 25 cases they would have quoted me higher than that. If I had wanted to buy more, they would have sold it at less. I wanted to buy 250 cases and they would not give me the 250-case price. After February 3, 1914, what was quoted to me was \$3.20 on my 250 lot order and before it was \$2.95. That was the proportion that obtained, and the two schedules with the allowance for quantity are the only two schedules that I know of that Cudahy ever did charge.

Q. You do not claim, do you, that you have any (166) contract with the Cudahy Packing Company which obligates them by its terms to supply you with Old Dutch Cleanser, do you?

MR. BAKER: We object to that because there is no such claim made anywhere.

MR. MONTAGUE: If it is conceded, that is all that is necessary.

Q. In your letter of November 13, 1914, which is plaintiff's Exhibit No. 18, which you put in evidence, you state this: "Whether your total output has been as large as previously or not, we, of course, cannot tell, although

we know of no reason why it should not have been as you create the demand and not the jobber." Now what did you mean by the phrase "you create the demand and not the jobber"? A. Just what it says. They are advertising, national publicity work, in the magazines, and I attribute none of it at all to the missionary work or the work of your detail men on the retail trade as creating any demand, I attribute the demand for Old Dutch Cleanser to the immense amount of money which you spent on advertising to the consumer and that creates the demand on the retailer and, in turn, on the wholesaler. The work of your retail man on the retail trade I do not consider and never have felt, and the result of my investigation has never shown, that it produces any real results in the sale of the goods. The thing that produced the results was that enormous outlay for national advertising, national publicity; that is what made the demand. By the "retail man" I mean the man that goes around and calls on the retail trade. In our business we call him a missionary man, but he is the man that is sent out by the manufacturer to call on the retail grocer to follow up (167) the demand that that retail grocer has from the consumer as the result of the general publicity work done by the manufacturer. If he goes into a retail store, he sees the situation and if he has a demand he tries to find out if the retailer has the goods, and to find out the work he is doing, and follows it up. Now that retailer has the demand from the consumer and he will not buy it unless he has the demand. If the missionary man were to sell him a case of goods that did not have the support of big publicity work back of it, the retail man would not do anything to push it on the consumer, and sooner or later, not having any demand, he would tell the jobber, "Come and take this stuff away and give me my money back, I have had no demand for it." As a practical matter it is vastly easier to sell these goods that have this demand created for them than other goods that do not have that sort of consumer demand; the only trouble is that it makes the goods much more expensive to the consumer because it adds to the cost of the goods, the cost of publicity is added to it. The purpose of this publicity is to bring to the eye and the mind of the consumer Old Dutch Cleanser; they see it on the billboards and in the advertisement and so on.

Q. That is a form of salesmanship, isn't it, in the

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same way that you, with your own salesmen might canvass the whole country here and show every house wife a can of Old Dutch Cleanser; it would be the same thing, wouldn't it; I mean they are both forms of salesmanship? A. No, I would not call it that.

The COURT: This is a thing that is argument for the jury rather than an issue to be brought out by the witness.

(168) The WITNESS: The wholesalers do not directly, but do indirectly pay for this advertising which the Cudahy Packing Company has done for Old Dutch Cleanser in the sense that the whole business bears the traffic. It is the Cudahy Company that designs the advertising and it is, so far as I know, to the Cudahy Company that those bills are submitted. None ever came to me anyhow. When I was handling Old Dutch Cleanser I did not go out to buy billboard space or street car space or magazine space for advertising Old Dutch Cleanser. That is all done by the Cudahy people, and it is that advertising work that makes it possible for us to sell the article, to sell any article like Old Dutch Cleanser, and to get full price to offset the goods that we have to sell at a low price.

Q. There are other cleansers on the market, are there not, besides Old Dutch Cleanser?

Mr. BAKER: We object to that as immaterial unless counsel states the object of it.

The COURT: It seems to me very immaterial; everybody knows there are other cleansers.

Mr. BAKER: I withdraw my objection.

The COURT: It is getting rather close to what the Court of Appeals says is immaterial.

Q. (By Mr. MONTAGUE) Can you mention any of those other things? A. Yes, Spotless Cleanser, Babbitts Cleanser, Octagon Cleanser—

The COURT: If there are others we can not go into that question.

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Mr. MONTAGUE: Then I will not go any further into it now.

The WITNESS: These missionary men who call on the retail trade and tried to interest them as I have described in Old Dutch Cleanser collect some orders from those retailers. When we were handling Old Dutch Cleanser some of those men brought in some of those (169) orders to us. We never kept account of those orders. I mean separate account. There were thousands of them, they came in by the thousands in the course of a month. A thousand of them came in in the course of a month, but we could not keep a record of anything like that. We have no books from which any such record could be compiled.

Q. If I should tell you that the records of the Cudahy Company show that in the year 1907, they turned in in that fashion to you orders for 629 cases of Old Dutch Cleanser, would that accord approximately with your recollection? A. I would not have any recollection on that, but I would be willing to accept their record.

Q. I am taking a figure that they have given; now in 1909, from the same source, I am informed that they turned in orders for 435 cases. A. If their records show that I have no doubt of it. A number of years showed there was a vast difference in the amount of the number of orders that Cudahy would send in because I do not know of any company that changed men so frequently as Cudahy did and sometimes they had no men here at all.

Q. In 1910, 879 cases were turned in? A. Whatever the record says.

Q. And in 1911, 806 cases and 1912, 808 cases, and in 1913, 576 cases were turned in.

The COURT: The witness says he knows nothing about it, but he says if the records show that he has no doubt it is correct.

Mr. MONTAGUE: If he does not want to concede it, I have the actual copies of those orders which I will bring over.

Mr. BAKER: It is not a question of conceding anything, it is a question of proper cross examination. This certainly has nothing to do with the examination of this

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witness, whether he is going to concede certain records (170) in Cudahy Company's files.

The COURT: He just knows that orders did come and he would not particularly doubt it, he says, if you or any other reputable person said it was so. It does not strike him as unlikely, he says.

The WITNESS: Orders which were brought in by these missionary men were turned over to the proper channels for distribution. I might say that our experience is that only about 50 per cent of the missionary orders the retail trade actually take. Those that were not filled we kept in the files for quite a period and if they are called for we give them to them, and after we keep them for maybe four or six or eight months, until the file is so full it is unwieldy, we destroy them. They were always there subject to their (Cudahy Company's) call, subject to the missionary man's call. He worked the trade and he could always tell if this party or that party had taken the goods; he could get the order back. We did not inform Cudahy & Company whenever there were orders turned in by missionary men, which orders proved to be unacceptable to the retailers. We did not inform them at all. There were too many of them. If they came in and wanted them we would get them out for them.

Q. There were about fifty per cent of those, you say?

A. That is our experience with missionary work, yes.

The COURT: I understand you are not speaking with special reference to Cudahy, but it is 50 per cent of all missionary work?

The WITNESS: Yes.

Q. You have no particular recollection as to the exact proportion of Cudahy's Old Dutch Cleanser as distinguished from other manufacturers on other lines?

A. No, sir.

Q. And the period to which you are referring where some orders were turned in by these missionary men which proved to be not accepted by the retailers, was that (171) the period of 1912 and 1913? A. My answer as I gave it says that that is our general experience with missionary work. If they turned in orders in 1912 and 1913, our experience would be the same with the orders sent in then as with any other time.

The COURT: I can not see the materiality of this particular line of examination, Mr. Montague. If it has any bearing I can not see what it is; it must be of the most remote character and it seems to me you have put as much time on that particular line as you should.

The WITNESS: I think Mr. Sonnehill was the salesman of the Cudahy Company in the years 1912 and 1913 who used to turn in most of the missionary orders to us. Some of them might have come from New York and some of their traveling men might have turned some in as they came through. To my recollection Mr. Sonnehill usually turned them in. The Cudahy Company asked us to carry other lines of goods besides Old Dutch Cleanser in what they called their Specialty Department or Old Dutch Cleanser Department and we carried them. That included Parrott Polish. We had Parrott Polish in stock.

Q. Did you ever have any discussion with them as to whether you ought to work harder in trying to push some of those other lines? A. We were never requested by the Cudahy Company to do anything special on their goods to the best of my recollection other than to always carry them in stock, to be able to cooperate with them to the extent of always being able to fill the demand that they created.

Q. Did they try some missionary work with respect to these other products? A. To the best of my recollection they did missionary work in those products.

Q. Do those products include Lilac, Rose and Parrott Polish?

The COURT: Tell me the bearing that this has on the (172) case? Where did it come in?

Mr. MONTAGUE: It comes in in this way: one of the great reasons why we did not regard Frey as a desirable connection was his failure to sell very much of these other lines which were newer and which we appreciated took more effort, and we did not get the kind of work on those which we really wanted pushed. I think that has been developed.

Mr. BAKER: You say it has been developed?

Mr. MONTAGUE: You can argue that when you get to the jury.

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Q. (By Mr. MONTAGUE) Was Dutch hard soap one of those products too?

MR. BAKER: We object to that on the ground that it is not proper cross examination. If at any time they expect to show that Mr. Frey was cut off by reason of the fact that he did not handle these other articles to their satisfaction, it is part of their defense and not part of the cross examination of Mr. Frey.

THE COURT: There has been nothing, as yet, that makes it relevant. I have asked the question myself as to its relevancy to see what it has to do with the case. There was nothing asked on direct examination that bore on that, so far as I recollect.

MR. MONTAGUE: He said this, your Honor, or at least tried to give the impression that he was cut off for acts that he had done in respect to Old Dutch Cleanser and he also put in, or his counsel put in, a very elaborate correspondence in which Frey paid his compliments to some of these other lines.

THE COURT: I will sustain the objection as I do not see that it is material now.

(Exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its seventieth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

THE WITNESS: In plaintiff's Exhibit No. 22, which is my office copy of my letter of February 6, 1914, which I sent to some jobbers in Virginia or thereabouts I say: "Can you supply me with some Old Dutch Cleanser? I will send you my personal check with order for the same made out in whatever way desired, so that there need be no record of the transaction." By the expression "made out in whatever way desired," I meant I knew that they would not want to ship me any Old Dutch Cleanser or bill it to me or have any paper pass that

might possibly get lost or stolen that might get into the hands of the Cudahy people by which they would know that they were selling Old Dutch Cleanser to me, or the Cudahy people would cut them off from selling me.

Q. Had they told you that? A. No, sir, but it was the general knowledge of the trade and your price list shows it.

Q. Had any one of them told you that? A. No, sir, that was my first letter to them, but I have your price list that shows that one wholesaler can not sell to another.

Q. When you say that was general knowledge, you (174) mean that is what you assumed? A. I knew it right from your own published matter.

Q. But not from them? A. No, sir.

Q. Or from any of them? A. No, sir.

The COURT: You say you knew it from the published matter?

The WITNESS: Yes, that one jobber could not sell to another jobber except at the retail price.

In response to that letter I did not get any Old Dutch Cleanser except 10 cases from M. W. Holt and Company of Norfolk or Newport News. I am not sure of the address. To the best of my recollection I paid Holt \$3.10 a case, either \$3.05 or \$3.10, and I paid the freight. I haven't got the freight bill, but I would estimate the freight on a case from down there at about eight cents a case. That would bring it up to about \$3.18 or \$3.20 a case.

Q. You could have bought from Cudahy for \$3.20, couldn't you? A. Sure.

Q. So you went to all that effort in order to save the price of a postage stamp? A. I had ten cases from Holt on his price to see what the freight would figure out and what I would make by having it. I would not have bought it from Cudahy at \$3.20 a case because I could not afford to sell it in my business, buying at that cost. My prices have to be figured as an average. I have to make a long profit on lots of things like Dutch Cleanser and certain other goods to be able to make an average profit on my whole line, because so much stuff has to be sold at cost in our business. This little lot from Holt, I was in hopes of being able to establish sufficient business with Holt until he could increase his sales with

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your company so that they would not get suspicious (175) of Holt and suspicious of where his stuff was going until eventually I would get enough to reduce the freight charges and get a better price from Holt and he (176) could give me better prices and I would build up a source of supply.

Q. And when it is all boiled down as to that particular transaction, the result of your transaction was to make only two cents off of the same amount that you could have bought from the Cudahy Company? A. That was the net result of the transaction, because he would not ship me any more.

The COURT: I do not know whether that is just exactly accurate or not; would Cudahy sell ten cases for \$3.20?

The WITNESS: Do you mean to people who were on their distributing list?

The COURT: No, who were not on their distributing list?

The WITNESS: I do not think they would, your Honor, I do not think they would sell to anybody who was not on the list at all.

Q. Did they tell you so? A. I just said that I did not think so.

Q. It is merely your own thought that you are now testifying to? A. Yes.

Q. And yet throughout this period the Cudahy Company was quoting you every time you asked them \$3.20 a case, wasn't it? A. Yes, which I consider was making a discrimination between—

Mr. MONTAGUE: I object to that.

The COURT: You always ordered 250 case lots?

The WITNESS: Up until my last order, which was a demand, and then I only ordered 25.

Q. You were not, after February 3, 1914, on the distributing agents list, were you? A. I knew nothing of (177) the distributing agent's list.

Q. You say you knew nothing of a distributing list at all? A. As to who was on the list and who was not on the list, no.

Q. Do you know whether you were on the list or off

the list after February 3, 1914? A. I know I was not on the list of what they term distributors.

Q. I read to you from your letter to the Cudahy Company dated November 13, 1914, and marked "Plaintiff's Exhibit No. 18", in which you say: "We have now been off your distributing list for about a year." That was true, wasn't it? A. That is right, distributing list.

Q. You knew what you meant, didn't you? A. Yes, but I did not use the words "distributing agents list" as you use them, because I did not know who was on your list and who was not.

Q. But you knew you were not on our list, whether you call it a distributing list or distributing agent's list, didn't you; you knew you were not on it? A. I knew I was not on the list of distributors who received your best quantity prices.

Q. In other words, to receive the prices that you got before February 3, 1914? A. Absolutely.

The WITNESS: On February 20, 1914, I sent the second letter (Plaintiff's Exhibit No. 23) to a lot more jobbers in Philadelphia. I got no Old Dutch Cleanser as the result of that letter. With regard to the first letter of February 6, 1914, which I sent to a lot of jobbers in Virginia, I got ten cents from Holt. While these letters of mine asking other jobbers to sell us Old Dutch Cleanser (178) were out and in their hands and within a week or two after that I circulated Defendant's Exhibit B in my own trade. This statement is in the circular: "We have just been notified by the Cudahy Packing Company that they will not sell us at regular jobbers' prices. They make Old Dutch Cleanser. This is another instance of the jealousy of the high-price jobbers who try to have us cut off whenever possible." I would not point out any one jobber particularly. We were constantly receiving information that a lot of the long price, big profit credit houses were complaining to manufacturers that Frey was selling his stuff too cheap and to have us cut off the list, and all that sort of thing. I can give you some instances of it, if you want. Some of those very people who received the letters of February 6th and February 20th, just referred to, might have been complaining about prices we sold at, that is common in business, and yet they might have been willing to sell us stuff at a little profit.

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Q. It is quite conceivable that they may have seen a copy of this paper, Defendant's Exhibit B, may they not? A. No, sir, they could not have seen it.

Q. There was nothing actually confidential about these things, was there? A. You, of course, are not familiar with our form of price list, Mr. Montague, but any one that is familiar with it can see right here that that is an exclusive city circular.

Q. It is possible for somebody to pick up one of these things, is it not, and send it through the mails?

The COURT: Is not that a matter for argument to the jury quite as effectually as with the witness? The jury can judge that as well as the witness.

Mr. MONTAGUE: I think it is of some interest to the jury to know whether this witness wants to take the position that it is absolutely impossible for any one of these people to receive it. Such a proposition is an absurdity and to our way of think it is so absurd that (179) the jury wants to take it into consideration.

The WITNESS: But I have not said that.

The COURT: My whole impression is that this whole line of inquiry is useless. He sent it around to the City trade and the jury is pretty nearly as able to tell whether some one in Norfolk or some other place else could have received it as he is. That is all I said.

Mr. MONTAGUE: He tried in his direct examination to create some mystery out of the fact that when he wrote all these letters he was not able to get any Old Dutch Cleanser and the mystery he tried to make of it was that we must somehow be at the bottom of that inability on his part. My point is that if at the same time he was sending these letters to jobbers asking them to accommodate him he was circularizing this whole town here, slamming them and calling them high-priced jobbers and telling them they were fleecing the community, they might have resented it.

The COURT: Now that you have made the argument I will say that you could have made that just as well to the jury as to the witness.

Mr. BAKER: I want to object to the statement about any mystery. We do not claim there is any mystery.

The COURT: Well, I will say to the jury that they are to pay no attention to what the lawyers say about

the facts in the case; it is what the witnesses say that is to govern them.

Q. (By Mr. MONTAGUE) Do you believe that the fact that you were saying this thing about the very people to whom you were writing may have had some influence in determining whether they would accommodate you or not? A. May I see the dates of those letters before I answer that?

(Letters handed to witness.)

Mr. BAKER: It might have been issued six months afterwards.

(180) Mr. MONTAGUE: They were all within three weeks.

The WITNESS: My letters inquiring for goods were all sent out, the first inquiry on February 6th, which was 19 days before this circular to the city trade was published and answers would have been back and forgotten about by that time. My inquiry to the Philadelphia and New York people was under date of February 20th and this was not published until February 25th. It is not very conceivable that they could have had this in their hands when they replied to my letters.

Q. They had them while they were still refraining from replying, hadn't they? A. I picked out jobbers that were far enough away from Baltimore to make it almost impossible for them to know anything about my trouble with Cudahy before they got my letters.

Q. The purpose of that was to pick out jobbers far enough away so that they would not know what you were saying about them, was it? A. No, sir, because I did not say it until afterwards.

Q. By saying this you thought that you would make them more willing to accommodate you, did you? A. No, sir, I did not have them in mind at all, when I said that.

Q. If you thought it was all right to write a letter to a man and ask him a favor and then, if you could say something about him in a place where he could not hear of it, that was all right, was it?

Mr. BAKER: We object to that.

(181) The COURT: I think you have gone as far on that line as it necessary.

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Mr. DOWIE: I think this witness should be instructed that he should not argue in answering the questions put to him. The last four questions he has answered will show that he has argued the question asked of him.

Mr. MONTAGUE: I would like to make this statement for the record, that these answers of the witness which have led up into this matter are all answers that I would object to and would move to strike out except for the practice of this court.

Mr. BAKER: I thought all courts tried to get the truth.

Mr. MONTAGUE: They do try to get the truth, but they do not try to get argument at the same time. You see Mr. Frey has the advantage of us, he has studied law and he takes care of himself wonderfully well and he could be on either side of this counsel table with equal merit, I think.

The WITNESS: In Plaintiff's Exhibit No. 8 I wrote Cudahy on March 6, 1914, "I am very glad to say we have been very successful in the sale of other cleansers which we have substituted on orders for Old Dutch Cleanser." That letter stated the facts as they existed, though at the time we were cut off of Old Dutch Cleanser we did quite a little substituting and it worked for a couple of orders, as we thought, and the people then sent back and said they didn't want any substitute, that if we didn't have Old Dutch Cleanser not to send anything.

Q. There are other cleaners that you could substitute in this market, are there not?

(Objected to as immaterial.)

Objection sustained; exception noted.

To the overruling of the defendant's objection (182) aforesaid, to which exception was noted, and permitting the witness not to answer the defendant excepted, and now prays the court to sign and seal this its seventy-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. I hand you a can and ask you if this can contains

a cleanser which is sold in Baltimore in competition with Old Dutch Cleanser?

(Objected to.)

The COURT: What is the purpose of the offer?

Mr. MONTAGUE: The purpose is to show that, as the witness has himself stated, substitution was possible and was actually practiced by the witness and could be practiced by other people too. In other words, it is show that we were subject to competition. On that point I will very frankly state that according to the ruling in the Great Atlantic & Pacific Tea Company case the conditions in this market in respect to the competition in other lines.

The COURT: I am familiar with the case.

Mr. MONTAGUE: We want to show that other cleansers were sold in competition with Old Dutch as having a very material bearing as to whether there is any such thing as discrimination or a violation of the law in any sense.

The COURT: Such testimony, as I understand it, is expressly held to be improper in this case by the court which controls me. The last one of these cases which was here was a case in which I followed a rule that I am (183) rather fond of, to let in everything that anybody could think was material to the case, and then, after it was all in, exclude it by the prayers, to exclude what I thought the jury ought not to consider, and the Court of Appeals thought that was going too far, and I think they have ruled that if you attempt to fix prices, if you have any combination or agreement to fix prices, it does not make any difference whether there is any particular article in competition or not.

Mr. MONTAGUE: I just wanted to make it clear that it is not in any sense my intention to be disrespectful to your Honor that I feel obliged to ask a series of questions on that line.

The COURT: I understand that. As I understand the decision in Frey against Welch Grape Juice Company, I must exclude that testimony.

Mr. MONTAGUE: There being that difference between the two circuits on the proposition, I, of course, think it necessary to develop it. I will ask a series of ques-

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tions on that line and if your Honor sustains the objection to them I will take my exception.

The COURT: Very well.

Mr. MONTAGUE: I now offer this can of cleanser to be marked for identification.

(184) (Can referred to, having been offered to be marked for identification only was marked "Identification F, Defendant's Exhibit.")

Q. I now hand you another can which is described as Kirkman's Powder, a scouring powder, and ask you if this is a cleanser which is sold in Baltimore marked in competition with Old Dutch Cleanser?

(Objected to; objection sustained; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its seventy-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: I simply say to the jury that the question being excluded that you are not to assume that it is in competition or is not in competition. Whether it is or is not is immaterial so far as you are concerned. You are to treat it as a matter that is not of any importance as to whether there is or is not competition.

Mr. MONTAGUE: I also ask that this can be marked for identification.

(Can referred to, having been offered in evidence for identification only, was marked "Defendant's Exhibit G for identification.")

I now hand you a can marked "Bon Ami Powder" and ask you if this is a cleanser which is sold in the Baltimore market in competition with Old Dutch Cleanser?

(Objected to; objection sustained; exception noted.)

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(185) To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its seventy-fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

MR. MONTAGUE: I ask that this can be marked for identification.

(Can referred to, having been offered in evidence only, for identification, was marked "Defendant's Exhibit H for identification.")

Q. I hand you a can marked "Octagon Scouring Cleanser" and ask you if this cleanser is sold in the Baltimore market in competition with Old Dutch Cleanser?

(Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its seventy-fifth bill of exceptions which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

MR. MONTAGUE: I ask that that can be marked for identification.

(Can referred to, having been offered in evidence for identification only, was marked "Defendant's Exhibit I for identification.")

(186) MR. MONTAGUE: I now offer in evidence the following cans and ask as to these cans, and as to the four cans previously offered for identification, whether from

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1912 to the present time these were sold in competition in the Baltimore market with Old Dutch Cleanser?

(Objected to.)

The COURT: I will sustain the objection.

(Exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its seventy-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: There is no necessity of offering all those; will not one or two of them do?

Mr. MONTAGUE: I would like to make the same offer in regard to all of them your Honor. There are 32 cans in number in this package, and I would like to ask the same question and get the same ruling on each one and have them marked for identification.

(Cans referred to by counsel were so marked for identification.)

(187) Q. Now, on November 13, 1914, in your letter to the Cudahy Packing Company of that date, which is Plaintiff's Exhibit No. 18, you stated, "Yesterday, for the first time since ceasing to buy direct from you, we wanted a case of Old Dutch Cleanser for one of our particular customers who buys all his goods from us." That was true, wasn't it? A. I will have to qualify that to answer it?

Q. Why didn't you qualify it in your letter? A. Because I did not think it was necessary.

Q. If it was unqualifiedly true. A. I wanted it bad enough to go and get it. I wanted Old Dutch Cleanser lots of times.

Mr. MONTAGUE: I offer in evidence the paper dated April 4, 1914, and offer only so much of it as is marked in brackets in pencil.

(Paper referred to by counsel, having been offered in evidence, was marked "Defendant's Exhibit J", and is as follows:

EXTRACT FROM DEFENDANT'S EXHIBIT "J."

READ CAREFULLY.

There are two articles we are not handling. These are "ACORN MILK" and "OLD DUTCH CLEANSER".

The Acorn Milk Company have been trying to get us to handle their Milk and even wanted to make us a proposition whereby we could make more money on their milk than any other Jobber was making on it. They, however, wanted us to agree to sell to the trade at a certain fixed price which we refused to do. We told them there was only one way that we would do business with them. That was for them to sell every jobber at exactly the same price and let the jobbers sell at whatever price they wanted to. If we sold lower than the other jobbers, that was none of their business, and if (188) another jobber sold less than us, that was none of their business, either.

They wanted to make us charge you too much for their Milk so we refused to handle it.

With such Milk as Pet, Peerless, Gold, Van Camps, etc., selling at the present low prices, the trade have not often asked for Acorn Brand.

As to "Old Dutch Cleanser", the Manufacturer refused to supply us at the Jobber's price, because they say we won't uphold their prices.

Our Mr. Frey has taken the matter up with the Department of Justice at Washington, who now have the subject in hand.

During his visit, the Department advised him that any jobber who agrees when they buy goods from a Manufacturer to sell at a certain fixed price, enters into a combination to maintain price, which action is absolutely contrary to law, so, that the Jobber agreeing to

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maintain a price is equally as guilty as the Manufacturer who insists on it.

With such Scouring Compounds as Potless Cleanser, Swift's Pride Cleanser, Babbitt's Cleanser, Bon Ami, Sil San, Bestence, etc., we do not feel that the trade will miss "Old Dutch Cleanser" very much. It is only natural that the retailer will push the goods that pay him the most profit.

MR. BAKER: Before you ask that question, I want to call the Court's attention to the question asked with reference to Exhibit No. 7, the letter of February 26. I read from page 149, where Mr. Frey was asked in regard to certain contents of that letter in regard to ascertaining his rights from the District Attorney. I objected to the question, and the objection was sustained. I have examined the record very carefully, and it might have something to do with the question of the credibility of the witness, or something to do with the question of bias, and I think I will withdraw my objection to those (189) two questions, the one on page 149 and page 150 of the testimony (being the subject of the 60th and of the 61st bill of exceptions.)

THE COURT: I think it should be admitted to the extent as to whether he consulted the District Attorney, but I will not permit going into this case as to what the views of the District Attorney were, or questions of policy.

MR. MONTAGUE: I might state that the purpose of my inquiry was to show that he had consulted the District Attorney, and, of course, should follow that up by a statement as to whether he knows the District Attorney has ever prosecuted—

THE COURT: That is absolutely immaterial, and will depend the question of construction from the Attorney General, and a whole lot of other things we can not put in here. He can answer the question whether he actually consulted the District Attorney. Mr. Baker thinks that better come in. But I am not going to permit going into that line of inquiry. It has nothing to do with this case.

MR. MONTAGUE: I should prefer under those circumstances, then, to rely on what I understand is the rule

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that counsel can not come in a day after he has made an objection and the objection is sustained and say that he will take it all back.

The COURT: Why, as a matter of fact, whether he can do so or not, I will. If he can not do it, I can.

Mr. MONTAGUE: On that, once more, it is a case of what your practice is as distinguished from what I have been used to.

The COURT: As a matter of fact, it is the business of the Court to correct any error that may be found at any time before the error becomes fatal. We are not sparring for points.

Mr. MONTAGUE: That is all I wanted, your Honor to make sure of that.

(190) The COURT: Did you consult with the District Attorney?

The WITNESS: I consulted the Solicitor-General Todd in Washington.

Mr. BOWIE: That was followed up with a question whether you did turn over the papers to the District Attorney, as he had stated, and that was also objected to.

Mr. BAKER: I withdraw the objection to that.

The COURT: Did you turn over any papers to Mr. Todd?

The WITNESS: I took them all to him, yes, sir.

The COURT: He used the wrong phrase. Mr. Todd is not District Attorney, he is one of the Assistant Attorneys Generals.

(Paper referred to by counsel heretofore marked by stenographer as "Defendant's Exhibit J.")

Mr. MONTAGUE: I will read the paper:

"Baltimore, April 4th, 1914.

"Read Carefully. There are two articles we are not handling. These are Acorn Milk and Old Dutch Cleanser. The Acorn Milk Company has been trying to get us to handle their milk and even wanted to make us a proposition whereby we could make more money on their milk than any other jobber was making on it. They, however, wanted us to agree to sell to the trade at a certain fixed price which we refused to do. We told them there was only one way that we would do business with

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them. That was for them to sell every jobber at exactly the same price and let the jobbers sell at whatever price they wanted to. If we sold lower than the other jobbers, that was none of their business, and if another jobber sold lower than us, that was none of their business either. As to Old Dutch Cleanser, the manufacturer (131) refused to supply us at the jobber's price, because they say we won't uphold their prices. Our Mr. Frey has taken the matter up with the Department of Justice at Washington, who now have the subject in hand. During his visit the Department advised him that any jobber who agrees when they buy goods from a manufacturer to sell at a certain fixed price, enters into a combination to maintain price, which action is absolutely contrary to law, so that the jobber agreeing to maintain a price is equally as guilty as the manufacturer who insists on it. With such scouring compounds as Spotless Cleanser, Swift's Pride Cleanser, Babbitt's Cleanser, Bon Ami, Sil San, Bestene, and so forth, we do not feel that the trade will miss Old Dutch Cleanser very much. It is only natural that the retailer will push the goods that pay him the most profit."

Q. Now, was it not the fact that in 1914 and 1915, and so on, up to May 12th, 1915, Spotless Cleanser, Swift's Pride Cleanser, Babbitt's Cleanser, Bon Ami, Sil San, Bestene, and so forth, were all compounds sold in the Baltimore market in competition with Old Dutch Cleanser? A. They were compounds sold in the Baltimore market, most of them, a five cent article, and only one of them, I believe, of the whole lot, to the best of my recollection offhand that was a ten cent article, and could be considered in competition with Old Dutch Cleanser, and they were never sold to take the trade away from the Old Dutch Cleanser, those that had been established on it and kept, having a demand for Old Dutch Cleanser just the same.

Q. They were all cleansers? And if you rub hard enough you might be able to clean something with them?

A. Yes, sir, I hope so.

MR. BAKER: I object to that as being immaterial, and going into the merits of the different articles.

(192) THE COURT: I only allow this to be brought in in so far as it bears on the truthfulness of his statement here, I am not going into the question of the merits of

these cleansers. We would never get through with that if you tried to bring out what the different merits of those different articles are.

MR. MONTAGUE: We do not want them tried out, your Honor. We are willing to commend them as much as we can. We want to establish the fact that they are competitors right in this market.

MR. BAKER: That is what we say is immaterial, and the court has ruled on it.

THE COURT: I rule it is immaterial whether he has competitors or not.

Q. Is this statement true which I have quoted: "With such scouring compounds as Spotless Cleanser, Swift's Pride Cleanser, Babbitt's Cleanser, Bon Ami, Sil San, Bestene and so forth, we do not feel that the trade will miss Old Dutch Cleanser very much." Was that the fact? A. We felt that way about it, but it turned out that the trade did miss it very much, judging from the continued demands we had for Old Dutch. We were never very successful in pushing the other stuff on them. We tried very hard, but could not do it, and the reason we could not do it was because of those advertisement of Old Dutch, and because the people wanted it.

Q. Have you any of the orders for those other cleansers which you sold, as stated in your letter to us of March 6, 1914, which I just read?

MR. BAKER: I object. What is the object of the question? I would like to know the object of it.

THE COURT: What is the relevancy of that question, Mr. Montague, what is the relevancy of it?

(193) MR. MONTAGUE: It is once more on this theory of showing that he was subject to competition in this market.

THE COURT: I sustain the objection to that.

MR. MONTAGUE: I take an exception.

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its seventy-eighth bill of exceptions, which is accordingly done this 10 day

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of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: I have none of the actual orders for Old Dutch Cleanser that we received subsequent to February 3, 1914. We did not keep them that long. In the cash department we never had any orders, just cash; the city department is all cash, people come in and buy their stuff and take a receipt, get a receipt for their money, a receipt for the items that they get, and we have a copy of that, and after that copy has gone through the regular work, and the profit figured up on it, and the sales totaled up on it, they are kept around for oh, two or three months, and they accumulate so fast, and then they are baled up and sold for old paper; the accounts are paid, and there is no trouble with them, and nothing like that. Out of town orders will come in, and they are written up on the order sheets, sent through the work, and in the course of six months they are baled up. It would make too many of them. They accumulate too fast. All these reasons make it an impossibility to determine the actual number of orders we had for Old Dutch Cleanser subsequent to February 3, 1914. The (194) paper on which the order that is received from the customer is put, which is the regular order pad, made out in triplicate, one copy becomes the original invoice for the customer, the other copy becomes, after it has been shipped, our day book. They are posted from there to the ledger. They accumulate very fast. We ship too many orders a day out of the out of town department to keep all that stuff. They will be kept around there until the space for which we have reserved for that purpose gets filled up, and if we have no other place to keep them, you know, and there would be no object in keeping them—we simply bale them. We usually go through the ledger before we do that, to see if there is any one particular order that we want out of it, that we might be called on to sue a fellow, and have to prove the shipment, and take the shipping order, and the order sheet, and the bill of lading, but the rest of them are baled up and sold for baled paper. The order sheets next day become the day book, and then they are kept until our space reserved for them is filled up, and then they are

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baled. They are taken out of the orders, and the paper baled and sold.

That order sheet does not show what the retailer who sends in his order by mail wants. It merely shows all we had of his order that we could ship him so that even that never would have showed the Old Dutch which he may have asked if we did not have it in stock.

Q. You testified yesterday that you knew of your own knowledge your method or the cost of carrying on your business. There are so many men who do not know, and there is so much dispute about it, that I am interested to know if you can tell me briefly how you compute your cost. I am now speaking of the computation which you went through when an order arrived, and the expense of doing the business, in those various years which you testified to yesterday. What are generally the large items that go in that, that a bookkeeper would use? A. I can give it to you in detail if you want it, or show you in the books.

(195) Q. Well, I do not want to take up too much time.

The COURT: Of course, it is perfectly proper cross examination of the testimony in chief, and as the thing now stands is of large interest, but it seems to me that those calculations of his general costs, and all that, have practically very little to do with the case, for this reason: That he did testify that he had bought Old Dutch Cleanser, that he could buy it, at 2.92 or 2.92 $\frac{1}{2}$; for about one-fourth of what he got, and 2.95, for all the rest, except three cases, and that he had sold the bulk of it at \$3.40, but that in a certain indefinite quantity, though limited to five customers, sold by a man named Swift, in his employ, at 3.15—

The WITNESS: Yes, sir.

The COURT: And there had been something like 100 cases shipped by some other shipper, I think 100 cases, at \$3.—

The WITNESS: Yes, sir.

The COURT: That seems to show what his gross profit on Dutch Cleanser was, and I really do not believe that any of these calculations of what his gross profits and all were is going to help us at all. Certainly it is not going to help us to an extent commensurate with the amount of time and trouble necessary to go into it.

Mr. MONTAGUE: Your Honor will recall that I had

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precisely that impression yesterday, and it was upon that I objected.

The COURT: At that stage of the case I ruled that in the absence of something better it might have afforded some basis for the calculation. But now you have got more definite and more precise testimony in, and the plaintiff will have to stand by that more definite testimony, and I think we would simply be wasting time. If you have any serious doubt as to the volume of his business, I will let you cross examine him about that, because (196) that is somewhat important, because if he was doing a million and a half business, it is quite obvious that the extra cost of selling, ten thousand this year, of Old Dutch Cleanser, would be very small and practically unappreciable but as to the percentage of costs to his business, and all that, I do not believe that we will get enough out of it to pay for the time that would be consumed in going into it.

Mr. MONTAGUE: Will your Honor entertain a motion, then, to strike out all of his testimony given yesterday in respect of the cost of doing business?

The COURT: Well, Mr. Baker does not seem to want it to go out. I do not see that it hurts you at all. You can cross examine him. Go ahead. But it seems to me it is wasting your time, and the jury's time, and all our time.

The WITNESS: Arriving at the expense of doing my business I take in every item, every cent, no matter how large or how small it is, every incidental that we make has to be made on an invoice. There is nothing set out as petty cash, or anything like that. I do not include the item of average interest on our capital investment. But apart from that I take in every item of outgo cash which we make in the course of a year, that is, selling expenses, wagon, drayage expenses, incidentals, warehouse expenses, rent, repairs to elevators, replacement and so forth. When I arrive at this percentage of cost as being a little over five per cent in 1913, a little bit less in 1914, and so forth, the cost of carrying on the business is computed the way I have just described in order to arrive at this percentage. The Court says I have given you the figures of my totals as well as for each of the years, and also my total costs. I can give you the exact figures as well, if you want them.

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The COURT: If it is important we can verify that percentage.

(197) Mr. MONTAGUE: Yes.

The WITNESS: I said that last year we sold one million eight hundred thousand dollars. In that year if our expenditures had been as large as ninety thousand dollars—I do not believe they were—but if they had been as much as ninety thousand dollars I would have said my cost of doing business was five per cent of my sales. I do not keep any books showing a separate cost of my City Department as distinguished from my out-of-town department. With regard to the question of whether there is a difference in the cost of operating my city Department as contrasted with my out-of-town department, why, whether it runs about the same, I might say I imagine if it could be separated, the cost of doing business in the City Department will run higher than in the out-of-town department, considerably higher. There is a great deal more waste, broken package items, and so forth. I should say that in the City Department, where we do our city business, the cost of operating would possibly run as high as six or six and a half per cent, because that is where all the waste is. The out of town business is nearly all original packages. In other words, it will, perhaps, run one per cent from the average and the out-of-town will run the other way. The Court asks how is that when the people come down and get the stuff themselves. I say we deliver considerable and charge in the drayage and the people come down there and they want to buy at our prices, and sometimes they can not always take the original packages, and it makes a great deal of broken package business where they buy in 10-pound lots and so forth, heavy waste in it.

The WITNESS: (Being further questioned) In the keeping of our accounts with our customers, as they come in—take the city department, a man comes in and buys an order of goods, we make up a little sales slip for him and if he pays cash we receipt it, so that he has got (198) something to show the goods belonged to him, of course. When we want to give him a rebate on any price of those goods, if it is an article where the manufacturer wants us to bill it at the list price, and does not care whether you rebate on it or not, we would bill it at the list price, whatever it is, \$6, say, and then at

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the bottom of the bill we put "old credit due", or "allowance", or something like that, whichever it was—I think the words "old credit due" is the word generally used. We do not carry in our books an account of "old credits" in which "credits" on all this is run in, because we do not need, have not any use for it. We give "Old credits" on quite a number of articles in the business.

Q. How do you determine to the satisfaction of the purchaser, let us say, whether his old credit shall be five cents or fifteen cents or five dollars or fifty dollars. A. When the purchaser buys his goods he usually wants to know what that "old credit" amounts to, and he is told right then.

The WITNESS: (Being further questioned): He does not say, "what is my old credit"? It is on his bill. If he wants to know just what each particular article it is on he asks the bill clerk, "What makes up this old credit?" The bill clerk determines how much this "old credit" is because he has the price book. It is in black and white. He don't have to figure it.

The COURT: He determines what is the lowest price they are willing to take for some of these goods, and the salesman has his memorandum, and he knows what is the lowest price, if the goods are quoted at 60 cents, as you say, and they are not willing to sell under 58, he knows that the maximum "old credit" to allow is 2 cents.

Q. Does that follow with different customers and different quantities at different times? A. No, it does not follow with anybody. It is one price to all regardless of quantity or anything else. I will qualify that to this extent. I do not want to say anything that is not absolutely very plain and exactly to the letter. Before Mr. Swift's death, which I think was in the fall of 1915, Mr. Swift would give special prices to some of the larger trade. Those special prices were not put on the bill by the bill clerk. He would make the allowance, regular allowance, and Mr. Swift would make a special allowance, and in other cases the bill clerk would not put them on, and Mr. Swift would make them all in other cases, and that would be about the only two ways, one or the other. Some of the trade would not pay cash right at the place; they have a number of stores, and we would extend permission of letting the stores send for what

they wanted, and then forward the bill to the main office and let them send the check in.

Q. Why do you call it "old credit?" A. Well, it is a figure of speech. Got to have something.

Q. Why didn't you call it what it is, simply say it is a rebate on Gold Medal flour, or a rebate on dried apples or dried prunes? A. Because it might have been a rebate on two or three things on the bill.

Q. So you usually—

The COURT: Wait a minute. Mr. Frey, you have already explained what the real reason is. According to your theory there are certain manufacturers, you say, who want their goods always billed at the billed price, but they are not particular whether you actually sell them at the billed price or not, so the public will think (200) they are billed at the list price, isn't that right?

The WITNESS: Yes, that is right, and we do not want to put the word "rebate" on there, so we call it a figure of speech, as, "old credit".

Q. You say you do not want to call it rebate? Why don't you want to call it rebate?

Mr. BAKER: I object to it.

The COURT: It is perfectly obvious. He just said that the manufacturer—he says that the manufacturer insists that the bill shall show that the goods were sold at the list figure that they fix on it, but they do not really care whether they are or not, so the form is gone through. You must go through the form. That is his story.

Q. And the manufacturers have suggested to you that you use the words of "old Credit" on your bills instead of using the word "rebate"?

Mr. BAKER: I object.

The COURT: There is no suggestion that they use the words, "old credit". According to his idea he can use any phrase he wants to, as far as they are concerned, provided it does not, on the face of the bill show that they are cutting their price.

Mr. MONTAGUE: I would like to press that question, if I may.

The COURT: All right. He has not said the manufacturers suggested it.

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Mr. MONTAGUE: I know that he has not said it yet, but I would like to know if that is the fact.

(Question repeated by stenographer.)

The WITNESS: The system and the word are just a scheme of our own manufacture. It is our own invention that phrase. We started using that phrase in our business away back. I could not tell you when it began, longer than five or six or seven years ago, and we have (201) used it ever since, right up until today, and are using it to-day. Whenever we sell a bill of goods that we want to give a credit on and do not want to show it is a rebate, we run in the word, "old credit". That is the practice in the City department. In the out of town department we do like other jobbers do, and mark on the face of the invoice an "allowance" or "credit", 8 cents or 10 cents or 20 cents, or whatever it is. That would be an allowance on the price, the same as the rebate. We don't ever use the words "old credit" in our out of town department. We keep no record of this whatever, no necessity of keeping a record. We have sold some Old Dutch since February 3, 1914, that is we sold what we had left of the stock. I could not tell you how much that was. Evidently it must have been getting rather low. We would usually order when we got down to 50 or 75 cases, we would order in another lot, and I suppose we had part of that left on hand yet, and we sold that out, and we got a little from A. Reiter in October, 1916, and we got ten cases from Holt, and there may have been cases, that I would not possibly have the slightest knowledge, where the city department or the out of town department, either one, might have sent out, and bought a case, might have bought two cases, and gotten some retailer to go up and pay cash for it, and bring it in to him and give him this for the purpose of filling some particular order they had, where they wanted to oblige a man, or something like that. On bills or orders that included any of that Old Dutch I could not tell whether we ran in any of this old credit. I do not suppose so, because the city department always sold Old Dutch at 3.40, except in this case that I found out after where I was giving them, where Mr. Swift was giving a special price.

Q. I am speaking of subsequent to February 3, 1914?

A. As I told you—

The COURT: He says he does not suppose they did, because when they were buying it in large quantities and getting it cheaper, they were not in the habit of doing it. (202) Mr. MONTAGUE: My impression was that the witness was referring to a period before February 3d, whereas my question was to a period subsequent to that.

The COURT: He answered you by saying that he did (203) not suppose they did, and gave the impression that even when they were getting large quantities of it, or limited quantities of it, at the low price, they sold almost all of it at the full price, and he hardly thinks that the few cases they got at a higher price, that they did it.

The WITNESS: The catalogues which we put out subsequent to February 3rd, 1914, included mention of Old Dutch. I think it is in there yet. The plate has never been changed. I would not pay for the cost of a new plate to take Old Dutch out. In the out of town catalogue the only way the word "special" is ever used is just like it is used there (referring to paper handed to witness, being Defendant's Exhibit "(C)") 3.40 a case, in single box lots. Now, I see that in this catalogue here, which you have under date of April 19, 1915, there is a price there quoted, at which time we did not have any, of course, at 3.20 in five case lots. That is evidently a typographical error, because the price of single case lots is put in here correctly. Now, where the word "special" is used in this catalogue means that if they want to buy 10 boxes, 25 boxes, and so forth, there is a special price lower than the single box price, which is always the manufacturer's list price for the particular quantity they want, but owing to the fact that on lots of stuff manufacturers name different prices for different sections of the country where this catalogue goes, like, for instance, in North and South Carolina, there is one price for Virginia, and Maryland, and so on, there is another price. We do not quote the big quantity price where they get freight prepaid, because the prices are different, and if a customer sends an order, an order for 25 boxes, at the price quoted here, f. o. b. for a point in Maryland, we could not ship to him because his price would be different in North Carolina.

Q. Then, that price was intended to create the impression that it was 3.40 for five case lots, and (204)

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3.20 for single case lots? A. That is a typographical error.

Q. Why do you think it is a typographical error? A. It should be 3.30 in 5 case lots. There was never any special price given to the out of town trade other than our quoted rate in the list on any specials printed.

Q. How often do you go over your catalogue to change the prices in it? How often do you make changes in your catalogues? A. Well, we get out a catalogue once a month since the war began. We did not always get them out once a month. In the period from February 3, 1914, up to May 12, 1915, we got out our catalogues every month. We did make some changes in the prices, in some of those catalogues. We will take a catalogue as soon as it comes out today. I will keep that on the desk, and as the price will change I will mark the change in the catalogue, and when we get ready for the next one, I will take those changes and make the changes in another copy that is clean, and send it to the printer. Sometimes we take out an item which is not manufactured any more, or placed on the market, but as in Old Dutch Cleanser if there are no other items to be taken out, to break up the form, other than in taking out the figure changed, why, I will just leave it stay in.

Q. Now, having computed your cost on these averages which you have already testified to, how did you arrive at your gross percentages of profit? A. We figure the profits on all our sales every day.

Q. How do you figure them? Just exactly what is the computation?

The COURT: At the end of the year I suppose you take your inventory.

The WITNESS: We figure them as we go along, your Honor, and put them into weekly totals. At the end of (205) the year we have our total amount of gross profits that our sales showed we should have made, and then we take our inventory, and that shows exactly what we have made. That frequently shows it to be frequently a little less than we should have made, owing to wastage or stealing.

Q. Now, in 1914, I notice that your testimony was that your cost was a little under five per cent, and your gross percentage of profits was a little over six per cent. Well, I suppose that obviously means that your net profit, I mean what you have to spend, if you were

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the whole company, or what your company has for its own use, to make dividends out of or dispose of it as it chooses is a little over one per cent profit. A. Yes.

Q. Your cost was a little bit less than 5, your gross percentage of profit was a little over 6, which means that your net profit was a little over 1? A. Yes, it was a little over 1, $1\frac{1}{2}$ or $1\frac{3}{4}$, something like that on sales.

Q. In 1915 you apparently did a little bit better according to your testimony of yesterday. The cost was a little under 5 and the gross profit was a little under 9, and that made 4 per cent profit, is that the fact? A. Whatever the figures show.

Q. In other words, a little bit over 1 in 1914, about 4 in 1915, and when you come to 1916, your cost was a little over 5 and your gross profit was a little under 9, so I suppose it would be something under 4 for 1916. A. A little under 5 and a little under 9, is that right?

Q. Yes—no, a little over 5, and a little under 9? A. About 4.

Q. A little bit under 4 per cent. A. Something like that.

Q. In pricing your goods, do you aim to get any special percentage of profit to come in to you?

(206) The WITNESS: In pricing our goods in the grocery business you can not pursue any fixed basis. We have to get as much as we can on such goods as are heavily advertised, where the people are willing to pay full prices simply because they want it because it is advertised to them, like Old Dutch, for instance, we have to get the full profit on a lot of those items to bring our average profit to a legitimate basis to continue in business, on account of so many goods having to be sold at no profit, and a great many articles in our business we handle, I believe, at really a loss and you have to strike your average profit from your speculative buying, and by your getting the best price on a number of things where the trade are perfectly willing to pay it, and that sort of thing. Now, I can judge my average. I am always able to keep track of whether my average is working right by the close system I have in the business. I can see Thursday night, for instance, what the results of the last week's entire operations were. Well, I can tell right away whether I have to lower the cost of some things and where things have got to be raised, or where they are too high. I do not like to lower them.

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For illustration, on Old Dutch, you can get \$3.40, and on Kirkman's I will have to sell that at maybe a 2 or 3 per cent profit. I have to charge what the traffic will bear and bring me the business, owing to my peculiar method of doing business. I have to offer inducements in the City Department to get people there. I have no salesmen in the City Department, and I have to offer inducements to get the people there to buy the goods. I can not take some arbitrary figure and say, "I will get a single rate of percentage on every one of my items". I can not do business that way. I wish I could. These answers that I have given you in respect to the way in which I conduct my business apply for all these years, from February, 1914, February 3, 1914, up to the present time. As I have explained each department, they apply to that department.

(207) Q. Well, I mean to say that you have got to take in the average of your departments of your business the same way, and that is the way you do that. I hand you this paper and ask you if that is a paper which you circulated on or about October 16, 1916 (handing paper to witness)? A. It is.

Mr. MONTAGUE: I will offer it in evidence—that is only page 1, being the first white page, and also page 32, and also the very bottom of the back cover, I do not particularly want page 32 (paper handed to Mr. Baker.)

The COURT: The first white page—(Speaking to witness) Are you the City Grocers' Union?

The WITNESS: We used to operate our City Department as the City Grocers' Union.

(208) (Paper referred to by counsel, having been offered in evidence, was marked "Defendant's Exhibit K.")

Mr. MONTAGUE: I will read this:

"BIG SAVINGS FOR YOU."

"Dear Sir:

"For a number of years the retail merchants in the large cities throughout the country have been buying their groceries through 'Buying Exchanges', or from Cash Departments of Large Jobbing Houses.

WALTER A. FREY.

"In Baltimore City we have for many years conducted a 'Cash Department', which has saved the merchants *'Thousands of Dollars.'*

"We are now going to extend this system to the country trade, and give you the benefit of buying at *'COST PRICES'*."

"The 'System' is simple.

"Instead of having to subscribe money to become a member of a buying exchange and taking the risks of the business, we supply the capital necessary to run the business and give you the benefits of it.

"We sell you at Cost and *only add one per cent for our profit.*

"A salesman selling on commission gets two per cent, so when we only ask one per cent for our compensation, you see how close we work.

"Our cost is figured as follows:

"We take the price paid the manufacturer, then add the expense of doing business, such as rent, salaries, cartage, etc., and then add one per cent profit. Doing an (209) enormous business, the cost of doing it is reduced to a minimum percentage.

"Look at the prices quoted in this catalogue.

"These prices are cost prices and you add one per cent to them to see just what the goods will cost you.

"Can you buy at such prices anywhere in the world?

"The system of buying at cost, carries with it *CASH* terms. All buying exchanges are conducted on the *CASH BASIS.*

"You make out your order, figure up the amount, add one per cent to it and enclose your check with the order.

"Your bill will be sent to you showing the amount of your shipment, the amount received from you and the balance, if any, to your credit, or it will show if there is any balance due us.

"If prices have changed materially since the price lists are issued, we will write you before shipping.

"On some articles the manufacturer sets the selling price. Those prices are marked with a star thus."

"On a few of these we cannot give a better price, but on almost all of them we give you a big rebate which shows on your invoice and is called 'Special Credit'. You will make your biggest saving in these Special Credits.

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"Go through this price list carefully. Make out your order and send check, money order or cash to cover it, and see what an enormous extra profit you are going to make out of your business.

"Remember orders must be addressed to City Grocers' Union, Pratt and Commerce Sts., Baltimore, Md.

"WE look for a very large share of your business.

"We will aim to serve you well. Very truly,

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"CITY GROCERS' UNION,
L. W. HAMMON, Mgr."

Now on the back page: "Where else on earth can you buy? Granulated Sugar—bbls. or bags at 7.05 per 100 lbs. *Net*.

"Barrels, 4-lb. Salt at $2.46\frac{1}{2}$ per bbl.—"——— and then is a computation—"2.44 plus 1%.

"National Oats, at $1.33\frac{1}{4}$ per case", and then the computation—"1.32 plus 1%" and so on for a whole list of commodities, with in each case the addition of 1%. Then the following:

"Think of our placing you in a position to get your goods at cost. The one per cent is such a very small item, on a box of evaporated Peaches costing you 1.75, for instance, it amounts to only $1\frac{3}{4}$ cents."

The COURT: Now, you can make any explanation you wish, if you want to.

The WITNESS: That was our price list gotten out—

Mr. MONTAGUE: Objected to.

The WITNESS: Gotten out at the time—

Mr. MONTAGUE: One moment. I make the objection and take exception.

And the defendant now prays the court to sign and seal this its seventy-ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: A gentleman employed, by the name of Walker, who was connected with the City Department

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wanted to extend the cash method to the out-of-town trade. He got up that catalogue in an effort to see if he could develop the cash business through any out-of (211) town people. He got up that catalogue and sent it out, three or four issues of which went out, I believe, and the statements made in there are, I think, very correct, and borne out by the figures. Cash discount is never considered in our business as a part taken off the cost of goods. The cost price of goods is the market cost price, and on most things you can not always figure on the price paid a manufacturer, because you pick them up at different points. There is no staple cost to them. Market cost plus the cost of doing business, and we have our one per cent and two per cent cash discount, and the one per cent we add on for profit makes two to three per cent, and the difference in the markets that we catch by speculative buying, and so forth, would easily make the profits, if that same basis were followed, on the entire business, equal to the figures read out.

Q. Is that all the explanation you care to make? A. That is all.

Q. I hand you a paper and ask you whether this is a bill paid out by your company to a purchaser of goods from you? A. That was made out in our office; that is one of our bills.

Mr. MONTAGUE: I offer in evidence the paper which the witness has identified, but only so much of the paper as reads as follows:

"Baltimore, Maryland, 4-1-15.

"SUBURBAN MARKET.

"Bought of Frey & Son, Inc.

"The wholesale grocers, Northeast corner Pratt and Commerce Streets.

"1 case Dutch Cleanser, 3.40 less 2%.....3.33

(Bill marked "Paid, April 5, 1915.")

(212) (Paper referred to, having been offered in evidence to the extent indicated by counsel, was marked "Defendant's Exhibit L.")

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Q. Is it your custom, in cash business in the city, to allow two per cent off? A. On an article on which they would maintain the price in the City department I suppose they would always have to allow the cash discount. Sometimes the bill clerks might make a mistake and not allow it. I do not make the bills out myself. I have to speak now of what the general instructions were.

The WITNESS (Answering further questions): My testimony this morning was that they sold Old Dutch Cleanser at \$3.40 and I presume they always had to take off the cash discount; that would be natural, I have bill clerks and the different bill clerks at different times may (213) have taken off two per cent or one per cent by mistake. It is no doubt that that man got that case. I testified just a few minutes ago that I could not swear that we had never sold a case of Old Dutch Cleanser during that time, that there might have been cases where the City Department, or the out-of-town department, might have sent out and gotten a case for somebody who insisted on our getting it for him. As a practical matter, most of the sales made by my concern are not made by me personally, but by some of my clerks of course. There are thousands of those sales. Of course I do not pretend to check up every one of these bills. If you followed them up you could probably find more of them here and there, but if there was much of it, it would have to come to my attention. The testimony that I have given is subject to the discrepancies of the kinds we have been speaking of.

RE-DIRECT EXAMINATION.

By Mr. BAKER:

The WITNESS: Mr. Walker got up the "Grocer's Helper" (Defendant's Exhibit K), and I wrote that article myself. That article is true. When I say it is true, so that the jury will not misunderstand it, I will say that the expression there—I should have written this article to stick absolutely to the fine lines as drawn by you lawyers, and we take the manufacturer's price instead of the price paid the manufacturer. The reason for that is that our cost price is based on the today's market cost, not what we might have paid for some stock that we had in stock that we bought six months ago and

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upon which we might have a very good profit. That book shows the price that we were willing to sell to the trade plus one per cent. It shows much less than the ordinary wholesale price at that time. The back of this Exhibit shows certain prices there plus one per cent. They were much less than the wholesale prices at that time. That was an effort to bring the country trade to (214) the cash method of buying.

Q. When you sent out the letter of February 6th and also the other letter in February to the wholesalers attempting to get Old Dutch Cleanser, the question was asked you what mystery there was in regard to your believing—

Mr. MONTAGUE: There was no mystery in this belief.

Mr. BAKER: Mystery back of his belief.

Mr. MONTAGUE: No mystery as to facts.

Mr. BAKER:—upon which you based your statements that you could not buy Old Dutch Cleanser from the wholesaler; I will ask you whether you had any of the literature of the Cudahy Packing Company at that time, or had received any of it? A. I had been receiving it regularly up to that time.

Q. I will ask you to look at these papers which I will afterward offer in evidence and I will ask you if that is the literature or some of it of the Old Dutch Cleanser, the Cudahy Packing Company. A. Yes, I had these. I do not know as I had this particular one.

Mr. MONTAGUE: I object to this as not proper re-direct examination and as trying to introduce evidence that, if it belongs in at all, belongs in as part of the direct examination.

The COURT: You asked him why he assumed that these people would be cut off or would be inconvenienced if they sold him this Old Dutch Cleanser at the cut rate, and he then said that he based that upon the literature or the prices of the Cudahy Packing Company. I think it is perfectly proper for counsel on re-direct examination to put that particular literature in.

(Examination noted.)

WALTER A. FREY.

Mr. BAKER: I offer this literature in evidence and I ask that it be marked separately.

Mr. MONTAGUE: They should be marked separately. They belong to different dates and they run back years (215) before the transactions here referred to.

The COURT: What are the dates on them?

Mr. BAKER: Here is one of January 1, 1910.

Mr. MONTAGUE: And that is five years before the commencing of this action and more than four years before the happening of any of the events relied upon in this action.

The COURT: I recall your examining the witness yourself about whether or not, as early as 1907—

Mr. MONTAGUE: But he is not asking what this man relied upon in 1915, your Honor.

The COURT: What is the one most recent before 1914?

Mr. BAKER: We have one in 1912. But I offer them all as being publications of the defendant Company which this witness says that he had.

The COURT: Let me see the 1912 one.

Mr. MONTAGUE: I will object to all of them on the same ground, that one was five years back and here is one that is three years back.

Mr. BAKER: There is one dated January 1, 1910, another one dated October 1, 1912, and two of them dated January 1, 1910, but the two of similar date are different publications. I offer them all in evidence.

Mr. MONTAGUE: I press my objection and object to it on the further ground that it is not proper re-direct examination.

(Objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and receiving the evidence aforesaid, the defendant excepted, and now prays the court to sign and seal this its eighty-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the (216) trial of this case.

JOHN C. ROSE, Judge. (Seal)

(Papers referred to, having been offered in evidence, were marked "Plaintiff's Exhibits numbered 24, 25, 26 and 27") and are as follows:

(217)

PLAINTIFF'S EXHIBIT NO. 24.

U. S. D. C. No. 111

SEEKING PRICE FOR RETAILERS

Old Dutch Cleanser



THE CUDAHY PACKING CO.

U. S. A.



(218)

PLAINTIFF'S EXHIBIT NO. 25.

O. D. C. No. 80

SELLING PRICE TO RETAILERS

Old Dutch Cleanser

EASES OF
HE SIFTING
TOP CANS



MADE ONLY BY
THE CUDAHY PACKING CO.
U.S.A.



(219)

PLAINTIFF'S EXHIBIT NO. 26.

O. D. C. No. 79

JOBBER'S' COST

Old Dutch Cleanser

(Cases of 48 Sifting Top Cans)

and

DUTCH HAND SOAP (10c Size)

(Cases of 48 Cakes in Cartons)



\$3.00 Per Case

for all territory

In and East of

the following states:

**North Dakota, South Dakota, Nebraska, Kansas,
Oklahoma, Texas, and the State of Colorado,
and Cheyenne, Wyo.**

FREE DELIVERY—Freight will be prepaid to all railroad stations in above named territory in quantities of 5 box lots and upwards of one or assorted brands of Old Dutch Cleanser, Dutch Hand Soap (either size) and Lilac Rose.

TERMS—60 days net, or 2 per cent discount for cash in 10 days.

QUANTITY DISCOUNTS will be allowed on orders for assortments of Old Dutch Cleanser and Dutch Hand Soap, (either size) and Lilac Rose, but must be in single deliveries to one buyer, and for his own regular distributive trade, as follows:

Minimum 100 box lots,	- - - - -	2½c per box
Minimum 250 box lots,	- - - - -	5c per box
Minimum Carload (or when assorted with soap carload)	- - - - -	7½c per box

Prices are only for prompt shipment to one buyer, and in no case will orders be accepted for shipment beyond thirty days from date of booking of order.

Jobbers' Cost in territory west of above stated territory, \$3.05 per case. For Western Retail prices see list No. 82.

OLD DUTCH CLEANSER and DUTCH HAND SOAP will be sold at above prices to only such Jobbers as strictly observe our published retail prices on all of their resales, whether to their regular retail trade, or to other jobbers and distributors.

For retail selling prices in above territory see list No. 82.

This list supersedes and cancels all previous lists.

THE CUDAHY PACKING CO.,

January 1, 1910.

O. D. C. Department,

(See important notice on page 3.)

SOUTH OMAHA, NEB.

VS. FREY & SON, DEFT. IN ERROR.
WALTER A. FREY.

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PLAINTIFF'S EXHIBIT NO. 27.

This exhibit is the same as Plaintiff's Exhibit No.
24.



WALTER A. FREY.

(221) The COURT: The important part in controversy is practically, if not absolutely, identical in all of them, showing a long continued system with reference to this matter which justified the witness in thinking, or might have justified him in thinking, it would be adhered to.

Q. In regard to the one per cent in 1914, and the four per cent in 1915, what explanation have you to make in regard to that? A. Difference in business conditions?

Q. There was some explanation that you wanted to make with regard to one of these exhibits where you published the statement that you had on hand Old Dutch Cleanser, what was that? A. Yes, that was the exhibit where we stated that we had lots of it, and I made the statement that we expected to get it. That was not mere expectation, I have letters there—

Mr. MONTAGUE: I object to this.

The COURT: Yes, I think that is enough of that.

(222) Mr. SMITH: (Reading from Plaintiff's Exhibit No. 26): "In Relation to Wholesalers Supplying One Another, IMPORTANT!

"It is the intent of our selling provisions governing distribution from jobbers' stock (or drop shipments from factory for account of jobber) that the prices provided for different quantity lots, are to govern without exception.

"If wholesalers should sell other wholesalers or distributors at an intermediate price between jobbers' cost and the fixed retail price, special prices might thereby gradually be extended to semi-jobbers to the ultimate restriction of our business.

"Any sales by jobbers at special prices could have no other effect than to enable the purchaser whether jobber, large retailer or otherwise, to demoralize prices and disturb the entire business in these products.

"To prevent this it is therefore essential that we be the only ones to decide who is to buy at wholesale prices, and it is for that reason that jobbers' sales to other jobbers and distributors should be strictly at our published retail list—or, in other words, at the same price at which the jobber would sell to any retailer.

"This is a matter of so much importance that we

WALTER A. FREY.

deem it essential to bring it prominently to your notice by this means.

"Yours truly,

THE CUDAHY PACKING CO.,
O. D. C. DEPARTMENT."

On the front of that same Jobbers' Cost List in red ink is this: "Old Dutch Cleanser and Dutch Hand Soap will be sold at above prices to only such jobbers as strictly observe our published retail prices on all of (223) their resales, whether to their regular retail trade, or to other jobbers and distributors."

Now, here is one under date of October 1, 1912. This is entitled "Selling Price to retailers, Old Dutch Cleanser". The wording in this and the other exhibits is the same.

RE-CROSS EXAMINATION.

By Mr. MONTAGUE:

Q. I hand you Plaintiff's Exhibit No. 26 and ask you if you have ever received any price list showing the prices to distributing agents from the Cudahy Packing Company since January 1, 1910 (handing paper to witness)? A. You mean a different list from this? Because this is the jobbers cost list?

Q. Have you received any price list or prices to distributing agents or to jobbers of Old Dutch Cleanser, whichever it may have been designated, since January 1, 1910? A. I could not say that I have or have not. If I had I turned them over to my attorneys and I might have received them and found there were no changes in them and I might not have kept them.

Mr. MONTAGUE: I will ask you gentlemen (addressing counsel for plaintiff) if you have received from Mr. Frey any price lists for distributing agents or for jobbers of a later date than January 1, 1910?

Mr. BAKER: This is the one, the other one which we received from Mr. Frey (handing paper to counsel).

The COURT: They offered one of October, 1912.

Mr. MONTAGUE: That was for retailers, as distin-

CHESTER H. THOMAS.

guished from jobbing agents and jobbers. I ask if that is the latest one that he received of that kind.

The WITNESS: I could not say that it was or was not. Whatever I have I have turned over to my attorneys, or else I did not keep them, there being no changes in the prices. I could not swear that I have received any since then.

(224) Q. Have you received from the Cudahy Company any price list entitled "Selling Price to Retailers", or entitled "General Sales List", subsequent to October 1, 1912? A. My same reply would apply to that. I got some of them, but I did not get them from the Cudahy Company.

Thereupon—

CHESTER H. THOMAS, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BAKER:

The WITNESS: (Answering questions): I reside at York, Pennsylvania. My occupation is the wholesale grocery business, one of the members of the firm of Frey & Thomas, York, Pennsylvania. That firm has been in business there twenty-two years. My territory is unlimited. We have a line of goods that we sell anywhere. I am not related in any way to Walter A. Frey. Mr. Frey of my firm is not related to Walter A. Frey, the (225) plaintiff in this case. I never at any time furnished to Mr. Frey any Old Dutch Cleanser.

Q. Did he or not make application to you?

Mr. MONTAGUE: The question is objected to on the ground that this application which has already been referred to which I made for a bill of particulars, and of which I have been denied, leaves us in ignorance as to what is being relied upon and whether my alleged agreement existed between the defendant and these people and it amounts to a surprise in view of the fact that we have not had these particulars and I object to the testimony, on the line that is now being developed, for that reason.

(Objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its eighty-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. MONTAGUE: I also ask, for the preservation of my rights, that as it is a surprise and this is the first information—

The COURT: Let the question come out and see what it is.

Mr. MONTAGUE: I will ask your Honor to let me state the grounds of my motion. This is the first information that the defendant has had that they are at all relying upon any arrangement between the defendant and this concern, and I ask for the withdrawal of a juror and a declaration of mistrial.

The COURT: I have ruled on that.

(226) (Exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, the defendant excepted, and now prays the court to sign and seal this its eighty-fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. (By Mr. BAKER) Did or not Mr. Frey at any time attempt to purchase Old Dutch Cleanser?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was note, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its eighty-fifth bill

CHESTER H. THOMAS,

of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. MONTAGUE: Our objection is on the ground that it is incompetent, irrelevant and immaterial and on the objections heretofore stated.

The COURT: The whole case rests upon a combination.

Mr. BAKER: But this witness is not offered for that purpose, your Honor. I haven't brought him here for that.

A. Yes.

Q. Did you sell it to him?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays (227) the court to sign and seal this its eighty-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. No, sir.

Q. Why not?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its eighty-seventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. I did not have it.

Q. Why didn't you have it?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its eighty-eighth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. I would not procure it from the manufacturers.

Q. I will ask you whether or not you ever purchased (228) Old Dutch Cleanser from the Cudahy Packing Company?

(Objection; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its eighty-ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. I did, yes.

Q. Covering what period of time?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its ninetieth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

CHESTER H. THOMAS.

A. I suppose I had Old Dutch Cleanser in my possession about six months—it was the latter part of 1911 when I started and in 1912 they refused to sell me.

Mr. MONTAGUE: I move to strike out the answer.

(Motion overruled; exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its ninety-first bill of (229) exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. Will you state the circumstances under which they refused to sell you?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its ninety-second bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. They claimed that I had made some bad sales.

Mr. MONTAGUE: I object to the term "they" as entirely too indefinite.

The COURT: Who told you?

The WITNESS: The Cudahy Packing Company from Chicago by mail.

The COURT: Have you the letters?

The WITNESS: Yes, I have the letter.

Q. I show you a letter dated January 4, 1912,—

The COURT: My view of it is that this tends to prove not an isolated act, but a general policy.

Q. I show you a letter of January 4, 1912, and ask you if you received that letter.

(Objected to; objection overruled; exception noted.)

(230) To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant, excepted, and now prays that the court sign and seal this its ninety-third bill of exceptions which is accordingly done this 10 day of August, 1917, as full and to all intents and purposes as if prepared and signed before the completion of the (231) trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. I did, sir.

Q. Did it come to you in the mail?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its ninety-fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. It came to me by mail, yes.

Q. Was there any enclosure in that letter?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal its ninety-fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

CHESTER H. THOMAS.

A. The enclosed form of application for jobbing terms, yes.

(Motion to strike out overruled; exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its ninety-sixth bill of exceptions which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. I will ask you whether or not there was in that letter any enclosure?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its ninety-eighth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. Yes, there was.

Q. Will you designate what they were?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its ninety-eighth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(233) The COURT: Let it be noted that counsel objects generally to all testimony of this witness, then you will not have to repeat your objection each time.

The WITNESS: There were two applications asking me to sign, dated January 5, 1915.

Mr. BAKER: I now offer them in evidence.

(Objected to; objection overruled; exception noted.)

Mr. MONTAGUE: And I also object on the ground that it has not been properly shown that these were received from the defendant.

Mr. BAKER: Will you admit the signature or not?

Mr. MONTAGUE: No.

Mr. BAKER: May I ask that the witness stand aside for a minute until I call another witness?

The COURT: Yes.

(Testimony of witness temporarily suspended.)

Thereupon—

LAURENCE SONNEHILL, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BAKER:

Q. Please state your name. A. Laurence Sonnehill.

Q. What is your occupation? A. Merchandise broker.

Q. Were you at any time connected with the Cudahy Packing Company? A. I was.

Q. During what period of time? A. From January 1, 1910, to about September 1, 1913.

(234) Q. Are you acquainted with Mr. Meyerhoff? A. I have received several letters indirectly signed by him.

Mr. MONTAGUE: I object to that on the ground that unless he knows his signature he can not tell who signed the letter.

The COURT: If he has received such letters in due course of mail and those letters have been answered, that is sufficient. Oh, do not try this case in this way.

Mr. MONTAGUE: I note an exception.

Q. You received letters from the Cudahy Packing Company signed by him, did you?

(Objected to; objection overruled; exception noted.)

CHESTER H. THOMAS.

A. I have on several occasions, but I am unable to tell the dates when I received them.

Q. I show you a letter dated January 4, 1912; if you can tell us whose signature is signed to that letter.

(Objected to; objection overruled, exception noted.)

A. That appears to me to be Mr. Meyerhoff's signature, as near as I can remember.

Thereupon—

CHESTER H. THOMAS, a witness heretofore sworn, whose examination was temporarily suspended, resumed the stand for

DIRECT EXAMINATION (Continued).

By Mr. BAKER:

MR. BAKER: Now, may it please the Court, I offer this letter in evidence.

(Objected to; objection overruled; exception noted.)

(Letter and attached papers, being offered in evidence, were marked Plaintiff's Exhibits Nos. 29, 29-A and 29-B, Nos. 29 and 29-A being as follows:

(235)

PLAINTIFF'S EXHIBIT NO. 29.

THE CUDAHY PACKING Co.,
111 West Monroe St.,
Chicago.

Old Dutch Cleanser Department
Cable Address "GLYSOAP"

January 4, 1912.

Messrs. Frey & Thomas,
York, Pa.

Gentlemen:

We enclose for your attention form of application for jobbing terms and declaration as to late business on Old Dutch Cleanser by your good company.

We would appreciate your carefully considering and filling out this form, if you find it available, returning one copy to us and retaining the other for your file.

In sending you this form we wish to state that it is owing to our having had complaints about your sales of this item.

Thanking you in advance for your attention to the above, we remain

Yours truly,

THE CUDAHY PACKING CO.,
Old Dutch Cleanser Dept.
MARHOFF.

CGM-ES

PLAINTIFF'S EXHIBIT NO. 29-A.

APPLICATION FOR JOBBING TERMS ON OLD DUTCH
CLEANSER.

York, Pa., January 5, 1912.

The Cudahy Packing Co.,
111 West Monroe Street,
Chicago, Ill.

Gentlemen:

We understand that in the distribution and sale of your product, Old Dutch Cleanser, you make same uniformly through jobbing distributive channels and that you suggest certain retail selling prices and terms in the endeavor to assure to each merchant a steady and reasonable return and profit for his service in handling the goods, and we recognize your policy as being most conducive to fair and satisfactory trade conditions.

(236) We further understand that while you require no agreement from any customer respecting the retail price and terms at which he will sell, you nevertheless maintain a special price for such jobbers as co-operate with you in the distribution of your products.

The undersigned being { a member of the firm of
of
an officer of
(give exact title) }

of Frey & Thomas, on behalf of said firm, submits to you that I am (and the management of said firm are) thor-

CHESTER H. THOMAS,

oughly familiar with the terms and selling prices of Old Dutch Cleanser.

THAT I understand the selling prices and terms to be as per list attached hereto, and that I (or my firm) have given positive instructions to every salesman to adhere absolutely to these prices and terms and to the office staff as it may affect the settlement of accounts.

THAT I am fully aware of the fact that it is contrary to your selling plan to sell at less than the prices as per price list attached hereto or on any better terms than the terms mentioned in the price list hereto attached, to any one, either wholesaler or retailer, as the case may be, by agents or otherwise, or to allow or promise to allow a discount or commission of any kind, directly or indirectly, on sales of Old Dutch Cleanser.

THAT for a period of at least six months preceding the date hereof I have not nor has my firm sold in the City of York, Pa., or elsewhere to any one, or permitted to be sold to any buyers, either wholesaler or retailer, respectively, Old Dutch Cleanser, at less than the prices above mentioned, or on better terms or discounts provided in said lists, and have not allowed or agreed to allow any other discount or commission, or allowance of any kind, directly or indirectly.

THAT I did not give, or offer to give, or promise to give or intimate, nor has my firm, that at any future time there might or would be given to any person for or on his behalf, any rebate, refund, reduction, discount (except as above), freight allowance, credit note or other consideration of value not authorized by the price list, or

THAT I have not permitted any of the travellers in the employ of our said firm to sell, offer or promise to sell, at less than above prices, or intimate that at any future time they might or would, or could, allow a rebate or discount on Old Dutch Cleanser at the time of settlement or afterwards, but that in every way the sales have been made according to the price List.

THAT I have not bought other goods at an advanced price, or sold other goods at a lower price, or permitted any of the travellers in the employ of our said firm to buy other goods at an advanced price, or sell other goods at a lower price in consideration of a sale of Old Dutch Cleanser made in the past or to be made now or at any future time.

THAT in cases where customers have paid their ac-

CHESTER H. THOMAS.

counts to me, or my Company in settlement, I have not allowed or permitted to be allowed a cash discount on Old Dutch Cleanser, except as provided in the said O. D. C. Price List, nor have we (or I) allowed a discount on any other line of goods except such as may be customary by the trade.

The foregoing statement made in the full assurance of my personal knowledge of its truth in every respect.

.....

(237) Plaintiff's Exhibit No. 29-B is a duplicate of 29-A above.

Q. Tell us what happened before the receipt of this letter with regard to your dealings with the Cudahy Packing Company?

(Objected to; objection overruled; exception noted.)

The WITNESS: At that time I was enjoying business with these people, receiving goods from them, retailing and doing a satisfactory business. I never signed that contract as you know.

The WITNESS: (Answering further questions): I mean I did not sign this paper, absolutely not. But I received the goods in a direct business way through other salesmen and I got the goods and I was getting them right along until they claimed in some way or other that I cut the price. Their salesman claimed I cut the price. His name was Bixler. These people had a representative in Harrisburg that covered that whole territory through there in canvassing for business. He came in to see me on his trips, which are about every four or five or six weeks, possibly every two months. He came around about six or eight times a year. I gave him business. I visited Harrisburg and Lancaster and other points in selling goods and he surmised that I had cut the prices on the goods because he did not procure the sales. Bixler said to me that I was cutting prices. He came to me one day and said, "You have cut the prices", and I said, "How can you prove it?" And he said "Simply because I can not get the business in the same town." So the consequence is they cut me off without the goods. Mr. A. F. Harbertson came to see me.

CHESTER H. THOMAS,

Q. I show you a letter and ask you if you received this letter. A. Yes.

Q. In the ordinary course of business? A. Yes.

(238) Mr. BAKER: I now offer this letter in evidence.

The COURT: Who is Mr. Harberston?

Mr. BAKER: His name is mentioned in the letter and I want to read the letter. It is from the Cudahy Packing Company.

Mr. MONTAGUE: We object to it on all the grounds heretofore stated and also on the further ground that these transactions occurred more than three years before the commencement of the suit and more than two years before any of the transactions referred to in the complaint. I also object to that on the further ground that he has not sufficiently proved the authenticity of the letter as coming from the defendant.

The COURT: Who does it purport to be signed by?

Mr. BAKER: The Cudahy Packing Company, E. A. S. I think when we show that Mr. Harberston, whose name is mentioned in that letter, came there that he was then on the business of the Cudahy Packing Company, and I think that would prove the letter.

The COURT: Let us see the letter. (After examining letter): Did you receive this letter through the mail?

The WITNESS: Yes.

The COURT: I overrule the objection.

(Exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and admitting the paper aforesaid, the defendant excepted, and now prays the court to sign and seal this its ninety-ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(239) (Paper referred to, having been offered in evidence, was marked "Plaintiff's Exhibit No. 30", and is as follows:

PLAINTIFF'S EXHIBIT NO. 30.

THE CUDAHY PACKING CO.,
111 West Monroe St.,
Chicago,

Old Dutch Cleanser Department
Cable Address "GLYSOAP"

January 9th, 1912.

Messrs. Frey & Thomas,
226-230 North George Street,
York, Pa.

Gentlemen:

Have your favor of the 6th.

We are very sorry at the position indicated in your letter.

We enclose price list, and call your attention to the regulations which, according to your letter, you have not been observing.

We make it a rule to retain on our preferred list of customers, to whom only we sell at jobbing prices, those who practically and fully cooperate in our marketing plan.

We are sending copy of the correspondence to our Pittsburg Division Manager, Mr. A. F. Harbison.

Regarding Harrisburg and your complaints about jobbers there, we can only say that your evidence is not conclusive, as retailer's statements are not always to be relied upon absolutely, and, in any event, we shall have to deal with the Harrisburg situation and the jobbers there on the merits of each case—and we shall at once proceed to make a careful investigation.

Yours very truly,

THE CUDAHY PACKING CO.,
E. A. S.

Q. Did Mr. Harbison call on you?

(Objected to; objection overruled; exception noted.)

A. He did.

CHESTER H. THOMAS,

Q. Did you have any conversation with him as to why you were cut off? A. Yes.

(240) Mr. MONTAGUE: My objection holds as to all this testimony, does it not, your Honor?

The COURT: Yes.

The WITNESS: He came for the purpose of finding out why we were cut off. He came especially to see me, direct from Pittsburgh. He told me how he came and whether he came for that purpose. He spent an hour or two in my office with me and asked me some particulars in reference to the case and I told him that he had been misinformed, that I was doing all I could to further the sale of it and keeping the prices, and there was possibly some special spite work by somebody else that caused this trouble, and he said he felt as if I was entitled to continue with them, but he could make no promises until he reported it to headquarters. So when I left him I was under the impression that I would be re-instated. The letter that I first offered in evidence, with its enclosures, came before Harbetsen's visit. Harbetsen came after that letter was written. After Mr. Harbetsen left, I ordered by mail a number of times. I did not receive any goods.

Q. I show you a letter dated March 1, 1912, and ask you if you received that letter in the ordinary course of business? A. Yes.

Mr. MONTAGUE: I object on the ground that he must first describe what the ordinary course of business means.

Q. I will ask you if you received the letter in the ordinary course of the mails? A. Yes.

Mr. BAKER: I now offer it in evidence.

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and admitting the paper aforesaid, the defendant excepted, and now prays the court to sign and seal this its one hundredth bill of (241) exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes

CHESTER H. THOMAS,

as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(Paper referred to, having been offered in evidence, was marked "Plaintiff's Exhibit No. 31," and is as follows:

PLAINTIFF'S EXHIBIT NO. 31.

THE CUDAHY PACKING CO.,
111 West Monroe St.,
Chicago.

Old Dutch Cleanser Department
Cable Address "GLYSOAP"

March 1st, 1912.

Messrs. Frey & Thomas,
York, Pa.

Gentlemen:

Beg to acknowledge receipt of your favor of the 28th.

Please refer to your letter of January 6th, and our reply thereto under date of January 9th and you will readily see that our position is not as unwarranted as you now seem to consider.

In our letter of January 9th we fully explained our position.

We are referring the entire file again to our Mr. A. F. Harbison, Division Manager at Pittsburg, who has charge of the territory in which you are located.

Our interests are altogether to recognize every legitimate jobber who fairly cooperates with our marketing plan.

As soon as we hear from Mr. Harbison, we will write you again.

In the meantime, we remain,

Yours very truly,

THE CUDAHY PACKING CO.,
E. A. S.

CHESTER H. THOMAS,

(242) The WITNESS: (Answering further questions: Since we were cut off, we have not been able to purchase any Old Dutch Cleanser from the Cudahy Packing Company.

CROSS EXAMINATION.

By Mr. MONTAGUE:

Q. Have you received any letter from the Cudahy Packing Company subsequent to March 1, 1912? A. Yes, quite a number of letters. There is a lot of correspondence there.

Mr. MONTAGUE: Before further cross examining this witness, I move to strike out his entire testimony on the ground that it is incompetent, irrelevant and immaterial, that it is not within the issues, that the relations between the witness and the defendant are not any of the issues to be tried in this action, the transactions testified to having occurred over three years before the commencement of this action and over two years and one-half before the first transaction mentioned in the complaint, and on the further ground that the demand for the Bill of Particulars disclosing the names of any persons with whom the plaintiff wished to charge an arrangement with the defendant were not given and therefore we are taken by surprise.

(Motion overruled; exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, and permitting the testimony aforesaid to stand, the defendant excepted, and now prays the court to sign and seal this its one (243) hundred and first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. MONTAGUE: I ask also for leave to withdraw a juror and ask for a declaration of mistrial on the ground of surprise.

(Motion overruled; exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, the defendant excepted, and now prays the court to sign and seal this its one hundred and second bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: The letter dated October 10, 1913, which you hand me I received about that time.

Mr. MONTAGUE: I offer that letter in evidence.

(Paper referred to, having been offered in evidence was marked Defendant's Exhibit M), and reads as follows:

(244) **DEFENDANT'S EXHIBIT "M."**

THE CUDAHY PACKING Co.,
Specialty Office,
12-14 Terminal Office Building,
Pittsburg, Pa.

10 10 13.

Messrs. Frey & Thomas,
York, Pa.

Gentlemen:

Acknowledging your favor of the 6th, Old Dutch Cleanser in 25 box lots is \$3.20 per box, less a cash discount of 2% ; cash to accompany order.

Yours very truly,

THE CUDAHY PACKING CO.,
AFILAEM. O. D. C. DEPT.

The WITNESS: The two papers you hand me, dated September 5, 1913, and September 9, 1913, I received on or about the dates respectively mentioned.

Mr. MONTAGUE: I offer them in evidence.

(Papers referred to, having been offered in evidence,

CHESTER H. THOMAS.

were marked "Defendant's Exhibit X. and O." and read as follows:

DEFENDANT'S EXHIBIT "N."

THE CUDAHY PACKING CO.,
111 West Monroe St.,
Chicago.

Old Dutch Cleanser Department
Cable Address "GLYSOAP"

September 9th, 1913.

Frey & Thomas,
York, Pa.

Gentlemen:

We have your letter of September 6th.

On receipt of proper remittance—as per our letter of the 5th from our Pittsburg office—your order will receive attention.

Yours very truly,

THE CUDAHY PACKING CO.,
E. A. S.

(245)

DEFENDANT'S EXHIBIT "O."

THE CUDAHY PACKING CO.,
Specialty Office,
12-14 Terminal Office Building,
Pittsburgh, Pa.

9 5 13.

Messrs. Frey & Thomas,
York, Pa.

Gentlemen:

Replying to your inquiry of the 4th, we are pleased to quote you Old Dutch Cleanser in five box lots at \$3.30 per case, less our regular 2% cash discount, cash to accompany order.

Yours very truly,

THE CUDAHY PACKING CO.,
O. D. C. DEPT.,
A. F. HARBISON.

AFILAEM.

The WITNESS: (Answering further questions): In view of these letters I do not wish to modify the last statement that I made that I have not been able to purchase any Old Dutch Cleanser from Cudahy. I did not avail myself of the prices quoted in these letters. Those quotations have never been withdrawn unless they are withdrawn in the mail there. That is all the correspondence. The letter you show me dated February 6, 1914, to which is pasted another paper I received in the mail on or about the date mentioned.

Mr. MONTAGUE: We offer them in evidence.

(Papers referred to, having been offered in evidence, were marked "Defendant's Exhibit P and P-A" and read as follows:

DEFENDANT'S EXHIBIT 'P.'

THE CUDAHY PACKING Co.,
111 West Monroe St.,
Chicago.

Old Dutch Cleanser Department
Cable Address "GLYSOAP"

(246)

February 6th, 1914.

Messrs. Frey & Thomas,
York, Pa.

Gentlemen:

In reply to your letter of the 4th inst., we enclose our General Sales List (No. 147) giving prices and terms on the basis of which we shall be glad to fill your orders.

Yours very truly,

THE CUDAHY PACKING CO.,
E. A. S.

DEFENDANT'S EXHIBIT "P-A."

O. D. C. No 147

GENERAL SALES LIST

Old Dutch Cleanser



THE CUDAHY PACKING CO.



CHESTER H. THOMAS.

(247) The WITNESS: (Answering further questions by Mr. Montague): The paper annexed to this paper, which is marked "Defendant's Exhibit P-A" was enclosed with that. That enclosure is the general sales list. This letter, Defendant's Exhibit P, conveyed to me the impression that I could buy from the Cudahy Packing Company Old Dutch Cleanser at the prices you have just read; I infer that is their prices. That is what they quoted me. I have known Mr. Frey (President of Frey & Son) personally possibly four or five years. I have known of him ever since they have been in business here. I have no business dealings with him. I never sell him goods. I never buy goods from him. I was in his place but once. We have had some correspondence. I see his publications scattered through the country; I do not get the papers from him personally.

The WITNESS: (Answering further questions): Mr. Bixler is one of these missionary men. His mission was in my neighborhood, in that territory, and that mission consisted in calling upon the retail trade. He would get from them orders for Old Dutch Cleanser. He would bring some of these in to me. I used to fill them. I began to handle Old Dutch Cleanser in 1911. The missionaries came in before I handled Old Dutch Cleanser, and I bought it to fill the orders and I continued to buy it from that time on.

Q. They came in before you stocked; you stocked to fill their orders and after you had stocked they brought in more orders? A. No, sir, you evidently do not understand missionary work. These gentlemen canvassed the trade first and they got orders from the retail trade. They brought them in to me and I started dealings with them by buying my stock from the same individual, Mr. Bixler, and gave him my original first order. That we continued, and every time he paid us a visit he would (248) bring orders and if we needed stock we would give him the order. The orders that he would bring in would be orders of retailers. Those orders would be filled out of the stock that I bought from Bixler from the Cudahy Packing Company. That obtained throughout the time when I was handling Old Dutch Cleanser.

Q. How large a proportion of the Old Dutch Cleanser which you stocked and sold in that way was in re-

CHESTER H. THOMAS.

sponse to orders which had been brought in in that fashion? A. If my recollection is correct, he has not sold ten per cent of the amount of goods that I bought from him for us.

The WITNESS: (Answering further questions): Mr. Bixler used to quote Old Dutch Cleanser to the retailers at the general sales list price, that is, \$3.40 under five-case lots. Independently of Mr. Bixler, I sold 90 per cent of my stock and Mr. Bixler, who is paid by the Cudahy Packing Company sold 10 per cent, taking it approximately.

Mr. BAKER: I understand all this is going in subject to exception.

The COURT: Yes.

The WITNESS: Mr. Bixler used to go around and visit the retailers in that same general region where I also was selling. He called on regular trips. I traveled salesman. I traveled once a week, one day in a week, I would say. My salesmen would be going in the same region where Mr. Bixler would be going. My salesmen would be trying to sell Old Dutch Cleanser for me and Bixler would try to get these orders, all the orders that he could, in order that he could plume himself with them, and present them to me as missionary orders.

Q. As a matter of fact, Mr. Bixler could not have gotten his orders at \$3.40 if you, in the same region, were quoting \$3.20 or \$3.30, could he.

(Objected to.)

The COURT: I think I might sustain the objection (249) upon the ground that counsel has no right to take up the time of the court in asking the absolutely obvious.

Mr. MONTAGUE: Your Honor has so completely understood what I knew this witness was going to say that I accept your Honor's statement.

The COURT: Mr. Thomas seems to be a man of attractive manners, and I have not seen Mr. Bixler, and I do not believe that Mr. Bixler could sell at \$3.40 if Mr. Thomas was willing to sell at \$3.20; whether Mr. Thomas was willing to sell at \$3.20 or not I don't know.

RE-DIRECT EXAMINATION.

By **MR. BAKER:**

Q. Why did you not avail yourself of the prices quoted by the Cudahy Packing Company to you in these several letters that have been offered in evidence?

MR. MONTAGUE: I object to that on all the grounds stated in my motion to strike out.

(Objection overruled; exception noted.)

A. I refused to buy simply because that is the price made to the retail dealer and I am not a retailer, I am a jobber.

Q. I show you a letter dated February 25, 1912, and ask you if you received that letter?

(Objected to; objection overruled; exception noted.)

A. Yes.

MR. BAKER: We offer that letter in evidence.

(Objected to; objection overruled; exception noted.)

(Letter referred to, having been offered in evidence, was marked "Plaintiff's Exhibit No. 32," and is as follows:)

(250)

PLAINTIFF S EXHIBIT NO. 32.

THE CUDAHY PACKING CO.,
111 West Monroe St.,
Chicago.

Old Dutch Cleanser Department
Cable Address "GLYSOAP"

Feb. 26th, 1912.

Messrs. Frey & Thomas,
York, Pa.

Gentlemen:

OLD DUTCH CLEANSER.

Our Pittsburg office has sent us your order of February 21st, for Old Dutch Cleanser.

CHESTER H. THOMAS,

Beg to refer you to recent correspondence in connection with our Old Dutch Cleanser marketing policy; and as this matter has not been worked out in a satisfactory manner to us, we are obliged to hold your order for the present.

Yours very truly,

THE CUDAHY PACKING CO.,
M.

Q. I show you a letter of October 14, 1913, and ask you if you received that letter.

(Objected to; objection overruled; exception noted.)

A. I did.

Mr. BAKER: We offer that letter in evidence.

(Objected to; objection overruled; exception noted.)

(Letter referred to, having been offered in evidence, was marked "Plaintiff's Exhibit No. 33," and is as follows:

PLAINTIFF'S EXHIBIT NO. 33.

THE CUDAHY PACKING CO.,
111 West Monroe St.,
Chicago.

Old Dutch Cleanser Department
Cable Address "GLYSOAP"

October 14th, 1913.

Messrs. Frey & Thomas,
#226-230 North George St.,
York, Pa.

Gentlemen:

Our Pittsburg office has sent us your letter of October 11th.

(251) We are writing our Division Manager, Mr. A. F. Harbison, in Pittsburg, to make it convenient to look you up at the first possible opportunity.

CHESTER H. THOMAS.

Meanwhile, we are unable to add anything to our last advices.

We will be glad if the forthcoming interview with Mr. Harbison will enable us to again place your name on our list of Distributing Agents for Old Dutch Cleanser, which position demands your practical and careful distribution and further introduction of the Old Dutch co-operation with our business policy in the increased Cleanser products.

Yours very truly,

THE CUDAHY PACKING CO.,
E. A. S.

Q. I show you a letter dated November 24, 1913, and ask you if you received that letter from the Cudahy Packing Company?

(Objected to; objection overruled; exception noted.)

A. I did.

Mr. BAKER: We offer that letter in evidence.

(Objected to; objection overruled; exception noted.)

(Letter referred to, having been offered in evidence was marked "Plaintiff's Exhibit No. 34" and is as follows:

PLAINTIFF'S EXHIBIT NO. 34.

THE CUDAHY PACKING CO.,
111 West Monroe St.,
Chicago.

Old Dutch Cleanser Department
Cable Address "GLYSOAP"

November 24th, 1913.

Messrs. Frey & Thomas,
York, Pa.

Gentlemen:

We are referring your letter of November 22nd to

CHESTER H. THOMAS,

our Pittsburg Manager, Mr. A. F. Harbison, requesting him to give the subject his early attention.

Thanking you for your advices, we remain,

Yours very truly,

THE CUDAHY PACKING CO.,

E. A. S.

(252) Q. I hand you a letter dated February 2, 1914, and ask you if you received that from the Cudahy Packing Company?

(Objected to; objection overruled; exception noted.)

A. Yes.

Mr. BAKER: We offer that letter in evidence.

(Objected to; objection overruled; exception noted.)

(Letter referred to, having been offered in evidence, was marked "Plaintiff's Exhibit No. 35"), and is as follows:

PLAINTIFF'S EXHIBIT NO. 35.

THE CUDAHY PACKING CO.,

111 West Monroe St.,

Chicago.

Old Dutch Cleanser Department,

Cable Address "GLYSOAP"

February 2d, 1914.

Frey & Thomas,
#226-230 North George St.,
York, Pa.

Gentlemen:

We have your favor of the 31st.

Mr. Harbison recently made a trip to York and called on you.

CHESTER H. THOMAS,

The conclusions which he then conveyed will have to govern us.

Yours very truly,

THE CUDAHY PACKING CO.,
E. A. S.

Q. I hand you a letter dated November 11, 1915, and ask you if you had received that letter from the Cudahy Packing Company?

(Objected to; objection overruled; exception noted.)

A. Yes.

Mr. BAKER: I offer that letter in evidence.

(Objected to; objection overruled; exception noted.)

(Letter referred to, having been offered in evidence, was marked "Plaintiff's Exhibit No. 36 A" and is as follows:)

(253)

PLAINTIFF'S EXHIBIT NO. 36-A.

THE CUDAHY PACKING CO.,
111 West Monroe St.,
Chicago.

Old Dutch Cleanser Department,
Cable Address "GLYSOAP."

November Eleventh, Nineteen-Fifteen.

Messrs. Frey & Thomas,
York, Pa.

Gentlemen:

Answering yours of November 8th.

We have decided that all things considered, the prospect for our having harmonious business relations is very slight, and that we do not care to undertake any dealings.

For this reason we have failed to answer any of your previous letters.

Yours very truly,

THE CUDAHY PACKING CO.,
E. A. S.

Mr. BAKER: This correspondence is offered in evidence, may it please the Court, because counsel on the other side said that we were offering the correspondence piece-meal. I do not care to read it to the jury.

Mr. MONTAGUE: I renew my motion to strike out on all the grounds heretofore stated.

(Motion overruled; exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, and permitting the testimony to stand, the defendant excepted, and now prays the court to sign and seal this its first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(254) LAWRENCE SONNEHLL, a witness heretofore sworn on behalf of the plaintiff, was recalled to the stand in that behalf and testified as follows:

DIRECT EXAMINATION.

By Mr. BAKER:

The WITNESS: (Answering questions): From January 1, 1910, to about September 1, 1915, I was in the employ of the Cudahy Packing Company. I might be regarded as a missionary man, seeing the jobbing trade also. That was the nature of my employment. I was stationed in Baltimore.

The WITNESS: (Answering further questions): My duties were calling on the retail trade, taking orders from the retailers and turning them over to the jobbers, taking orders from the jobber, and turning them over to the Cudahy Packing Company. I am acquainted with Frey & Son and Mr. Walter A. Frey. I have known

LAWRENCE MONSIEUR.

them for years. Quite often I had dealings with them, I representing the Cudahy Packing Company. A great deal of his business passed through my hands.

Q. Just tell us how you sold to him, and what orders, if any, you took in and just state to the Court and jury just in what way you transacted the business. Just state how you did business with Mr. Frey and other wholesalers here in Baltimore.

The WITNESS: Whenever Mr. Frey wanted goods he ordered them from me, and I sent them to the Cudahy Packing Company. I turned over a lot of missionary orders that were gathered from the trade that I called on and turned them over to Mr. Frey, and got Mr. Frey to O. K. them or receipt for them, that is, sign his signature, and I sent them in to the Cudahy Packing Company. By the missionary orders I mean. There was a great deal of advertising being done in different ways. We advertised the stores and we got the merchant interested and told him and spoke to him about profits, and got him interested in Old Dutch Cleanser, and got his order where we could and turned it over to the jobber, which the jobber is supposed to execute. As an example, I would get an order from a retailer. How would I know what jobber to take it to? It was always customary to ask him what jobber he wanted it through. We never took anything for granted. He must state what jobber he wants his orders through. Suppose he would name jobber B. & Company? If he was a jobber in good standing and we were selling him, why I would take his order through that jobber. By a jobber in good standing I mean that he was buying and purchasing goods from the Cudahy Company if he was on our direct buying list. If a man gave an order on a jobber who was not, I would try to persuade him to put it through some jobber, name a jobber that was favorable to us, that was buying from us. When I first became the representative of the Company, here in the City of Baltimore we had a few jobbers here that were not on the list, they either could not buy the quantity, or for credit reasons and that was for the Cudahy Packing Company to decide, and not me, and I think when I took the jobbers and combined jobbers and retailers every man was buying direct here with the exception of the Baltimore Wholesale.

Q. Did you have any trouble with Frey & Son? A. I individually had no trouble with anybody individually.

I never found out anything wrong in this field, as I know of.

Q. Did your company have any trouble, so far as you know?

Mr. MONTAGUE: I object to that on the ground that he has now stated that he had no knowledge of any trouble.

Mr. BAKER: No, he did not state that.

The COURT: No, he did not state that. He said that he had no trouble with them personally.

Mr. MONTAGUE: Then, I ask that his answer be confined to his own knowledge.

The COURT: He was asked if they were in trouble, and he said he never had any trouble with them individually.

Mr. BAKER: We ask you to produce—in our notice (256) we asked you to produce all correspondence between the Cudahy Packing Company of New York, and any of their agents here in regard to Frey & Company. Will you produce that correspondence?

The WITNESS: Maybe I may have misunderstood the question. There was no trouble. On March—about March 18, 1913, I think I was instructed by the Cudahy Packing Company, signed "Grace".

Mr. MONTAGUE: Just a minute. There is no question now, as I understand it, and you better wait for a question.

Mr. BAKER: Just wait, and I will ask you a question.

The COURT: He said he wanted to explain that mabe he was wrong in saying he had no trouble, and wanted to make some explanation of that, and started off to say that on the 18th of March, 1913,—(speaking to witness) Was it?

The WITNESS: As near as I can recollect, yes, sir. About that time I received a letter from the Cudahy Packing Company—

Mr. MONTAGUE: I think you better wait for a question on that.

The COURT: He just simply wanted to put himself straight, and that there was something that might fairly be called trouble, in which he had a part.

(Correspondence produced and handed to Mr. Baker.)

LAURENCE SONNEHILL.

Mr. BAKER: Have you got the correspondence between the New York Office and the New York representative?

Mr. MONTAGUE: That is all I have got.

Mr. BAKER: All right; then, I will proceed.

The COURT: You said something about receiving a letter signed "Grace". Is he in the New York Office or the Chicago Office?

The WITNESS: T. J. Grace is in New York

Q. What letter did you receive from Mr. Grace? A. The letter of instructions—

Mr. MONTAGUE: Excuse me. What is the date of that?

(257) The WITNESS: As near as I can remember, March, 1913.

The COURT: Did you find that letter in the correspondence?

Mr. BAKER: No, it is not there, if the Court pleases.

The WITNESS: (Answering further questions): I made a copy of that letter. I was asked to send the letter back to New York and sign for it, send it back to New York and the instructions were carried out. This is a copy of the letter that I sent back to New York (handing letter to witness). I made the copy at the time. It is part of my file, put in my file, to carry out the instructions.

Mr. BAKER: I offer it in evidence.

Mr. MONTAGUE: I object to it on the ground that it is incompetent, irrelevant and immaterial, and I object also on the further ground that it relates to transactions which are not referred to in the declaration.

The COURT: Objection overruled.

Mr. MONTAGUE: Exception noted.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and admitting the paper in evidence, the defendant excepted, and now prays the court to sign and seal this its 104th bill of exceptions, which is accordingly done this 10 day of August, 1917,

as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Letter referred to by counsel, having been offered in evidence, was marked "Plaintiff's Exhibit No. 36" and read by Mr. Smith as follows:

"New York, March 18, 1913.

"Mr. L. Sonnehill:

"Dear Sir:

(258) "Until further notice you will please not call on Messrs. Frey & Son, Baltimore, Maryland.

"Any orders that you may receive for their account or which may be tendered to you are to be referred to this office.

"Kindly return this letter with your acknowledgment.

"Yours very truly,

THE C. P. CO.,
T. J. GRACE,
O. D. C. Dept."

The WITNESS: When I received that letter I carried out instructions and ceased taking the orders that were for Frey & Son through Mr. Frey. I sent them anywhere I could, to any jobber.

Q. Did anything occur thereafter, any men come from New York? A. Mr. Philp came down to see me. He was the New York manager. He was the man I was directly responsible to and he came from New York down here.

Q. What occurred between you and Mr. Philp?

Mr. MONTAGUE: I object to that on the ground that it does not relate to any transaction referred to in the complaint, and therefore incompetent, irrelevant and immaterial.

The COURT: Overruled.

LAURENCE SONNEHILL.

Mr. MONTAGUE: Exception noted.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(259) The WITNESS: We went down to see Mr. Walter Frey and I told him he would not have any trouble with Walter Frey, and Walter Frey would do anything within reason.

Mr. MONTAGUE: Is that what you told him?

The WITNESS: That is the conversation that passed between Mr. Philp and myself. Mr. Philp was the New York man.

Q. Did Mr. Philp say what Mr. Frey had done? A. No, sir. He said we had a little trouble, let us go down and see Mr. Frey. I said, All right, we will go down and see him, because Walter Frey will do what is right. He will do anything that is right and within reason. We went down to see Walter Frey—Frey & Son—and Mr. Philp had an interview with him. I cannot recall what the interview was, but I remember he came outside and shook his head and walked up the street, and of course, I was fighting to keep everybody down here on the list.

Mr. MONTAGUE: I object to that.

Q. Just state what took place between you and Mr. Philp. A. All right. We got up as far as, I think, South and German Streets, and he said, "I am not satisfied, I ought to have seen something down to Frey's, and we will have to go back again", and we went back to Frey's and he asked Walter Frey to show him an invoice or something in his book, and he went over that, this invoice, or whatever it was, and he came out—

Mr. MONTAGUE: Were you present when that happened?

The WITNESS: I was with Mr. Philp all the time we were there; we came out, and Mr. Philp and I were talking and went to the Western Union at Calvert and Fayette Streets, and he sent a wire west, and, so afterwards, I was notified, some time after that, I was notified to take orders through Frey.

Mr. MONTAGUE: This was all after March 18th.

The WITNESS: That was the time they are talking of the letter in which I was instructed again to go and call on Frey.

(260) Q. Did Mr. Philp say anything to you as to why Frey was cut off? A. Oh, we had been wrangling with Frey a good long while down here, every man they had in the field, I think we had been wrangling that Frey was cutting goods, but I could not get any evidence where Frey was cutting goods. When Mr. Philp told me about the trouble with Frey he did not say anything about cutting prices. That would not come under—unless they made a direct appeal, that would not come under me at all. It was Mr. Philp's business to go down there and straighten that matter out other than me. He was to pass on the decision. I did not hear what he said to Frey. He was sitting alongside of Frey, and I did not remember any more what it was that was said, and I was standing in the doorway. I did not hear any conversation with Mr. Frey and Mr. Philp at all. I did not see the invoice that Mr. Philp looked at.

Q. Did any one else come down from New York at any time in regard to Mr. Frey? A. Yes.

Q. Who was that? A. We had a consultation at the Emerson Hotel—I can not remember the date—with Mr. P. M. Berry and Mr. Philp.

The WITNESS: (Answering further questions) Mr. Berry was from Philadelphia. It lasted as near as I can recollect, two or three hours. This conversation was after the 18th day of March. Mr. Philp, I think, let in June—about June 26, 1913, and Mr. Carson took his seat, and I think it was during that period, or afterwards—I am not sure—I think so, but I may be wrong. Mr. Philp, Mr. Berry and myself were present at this conversation.

Q. Tell us just what took place there? A. They accused me of knowing of Frey cutting the goods, of know-

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ing that Frey cut the cost on Old Dutch Cleanser, and I told them they would have to show me some evidence. I (261) said that I had nothing in my possession to show, and I wanted to know if they had it in their possession, because I knew unless they could establish those facts, whenever they cut off a jobber here it made it very hard for me. It was up to me to keep them on the list unless they were violating some agreement.

Q. What do you mean by that, violating some agreement?

Mr. MONTAGUE: I object to the word "agreement" as a very large word. It is not for this witness to characterize a thing as an agreement.

The COURT: Pardon me. There are some things that he can characterize as agreements without any trouble in the world, for instance, you ask him to dinner, and he said he would go.

Mr. MONTAGUE: There may be some things your Honor, but when we are charged with entering into an agreement it is for this jury to find out.

The COURT: Well, he is doing all that can be done by asking him. We will know in a moment whether he is right or not.

Mr. MONTAGUE: I will press my objection and note the exception.

The COURT: You can press it and I will rule. The witness is being asked to tell what he means by violating the agreement, and in a minute we will know whether there is anything in it.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(262) The WITNESS: I mean, by violating agreement, if they were abiding by the instructions issued by the Cudahy Packing Company, and the instructions were that jobbers were to maintain the prices.

Q. Maintain what prices?

Mr. MONTAGUE: I object to the word "maintain", or what the instructions were, or violating agreements.

The COURT: Overruled.

Mr. MONTAGUE: Those were all characterizations, and called for conclusions, and what was said and done is what we wish, not generalities.

The WITNESS: I have a book of instructions. I can say I had a book of instructions.

The WITNESS: (Answering further questions): I have the book of instructions here now, book of instructions of the Cudahy Packing Company to the salesman, passing on everything that—

The COURT: We can get that.

Q. Now, I will show you a paper, or rather a book marked, "Cudahy, Omaha, U. S. A., Old Dutch Cleanser Department", and I ask you what that is (handing book to witness)? A. Well, these are the books that a salesman generally gets when he breaks in—

Mr. BOWIE: Just one minute.

Mr. MONTAGUE: I submit that the book will speak for itself.

The WITNESS: All right. This book was in my possession.

Q. Where did you get it? A. I came to me in a grip by express from New York.

Q. From whom? A. From the Cudahy Packing Company, but the time I can not recall just when, or who it was. I knew we had put a salesman or two here, and (263) I had to have an additional book, and I gave him mine and I took this because this book was newer than mine, and mine was pretty well worn out. That is the way I identify it.

Mr. MONTAGUE: If you got the date when you got it?

The COURT: About when did you get it?

The WITNESS: That I can not say, sir.

The COURT: Was it enforced, your instructions, as long as you were with the concern?

The WITNESS: Yes, we used to add to that your Hon-

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or. If any other instructions are gotten out, why, we were supposed to place it in that book.

The COURT: It is a loose leaf book, is it?

The WITNESS: Yes, sir.

Q. Now, then, I show you a paper—

Mr. BAKER: You had better mark that, first.

Mr. MONTAGUE: I object to it as incompetent, irrelevant (264) evant and immaterial, and further, it has not been shown to relate to a period within the time of the transactions mentioned in this declaration.

The COURT: Overruled.

Mr. MONTAGUE: Exception.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and admitted the book in evidence, the defendant excepted, and now prays the court to sign and seal this its one hundred and eighth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(Book referred to by counsel, having been offered in evidence, was marked, "Plaintiff's Exhibit No. 37").

The WITNESS: The paper you hand me, dated April 6, 1912, came through the mail to me from New York or Chicago, I am inclined to think it was Chicago, from the Cudahy Packing Company.

Mr. BAKER: I offer the book in evidence and also offer the paper in evidence.

Mr. MONTAGUE: Same objection.

The COURT: Same ruling.

Mr. MONTAGUE: Exception noted.

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted and now prays the court to sign and seal this its one hundred and ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes (265) as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(Book heretofore marked as "Plaintiff's Exhibit No. 37" by the stenographer, and paper referred to by counsel, having been offered in evidence, was marked "Plaintiff's Exhibit No. 38.")

Mr. BAKER: This is Exhibit 38, and I will read it:

"THE CUDAHY PACKING CO.,
111 West Monroe St.,
Chicago.

"Old Dutch Cleanser Department,
Cable Address "GLYSOAP."

"CONFIDENTIAL INFORMATION
As to our
OLD DUTCH CLEANSER
Marketing Plan and Price Provisions.

"To our General Representatives:

"O. D. C. PRICE LISTS contain full and exact particulars as to our price provisions, marketing plan and sales regulations.

"JOBBERs are those dealers whom we carry on our preferred list of customers, and it is only to such that we sell at prices and under the conditions shown in our special Jobbers' Price List. We recognize in this class only those wholesale distributors who have no retail affiliations.

"VIOLATIONS: Where a preferred (or jobbing) customer violates our marketing plan or price provisions,

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it is our policy to discontinue him from our list of preferred customers.

"We put on each Jobber's invoice a stamp reading as follows: 'On all your resales of the Old Dutch Cleanser covered by this invoice, to either retailer or jobber, please observe our regular retailer's cost prices, in accordance with our published list.'"

"Our O. D. C. market plan, through jobbing medium rests on mutual confidence, respect and cooperation and we look to the principle in control of each jobbing house for the carrying out of our policy within its ranks.

"Our general representatives are requested to make our policy clear to our customers at every available opportunity, to ask their support and gain their appreciation for the following important reasons:

"Old Dutch" is the original, the standard and the recognized seller in that line.

"It is continuously advertised on an important and (266) National scale. It is marketed through exclusive jobbing channels. To maintain a uniform price is the only way to insure the jobber a fair and reasonable profit, and we will spend out time and money freely in support of this policy.

"We canvass the retail trade through a large and well organized force of specialty salesmen.

"We treat our customers with uniform consideration, courtesy and equality, making no exceptions and extending no special favors to any class of trade or to any special territory.

"We ask of our general representatives a careful consideration of the above facts, feeling sure that their proper understanding and steady promotion of same will secure for us the good will and appreciation of the wholesale trade and its support in the sale and further distribution of Old Dutch Cleanser.

Yours very truly,
THE CUDAHY PACKING CO."

MR. BAKER: Now maybe we had better read the parts of the book we desire (Plaff's Ex. No. 37).

MR. SMITH: (Reading)

"Maintenance of Price Schedule.

"It is our policy in marketing Old Dutch Cleanser and Dutch Hand Soap to wholesale grocers to maintain a uniform selling list (as published) to the trade. List shall be observed absolutely by all of our connections and by jobbers and distributors handling our goods, without exception.

"All jobbers of our Old Dutch Cleanser and Dutch Hand Soap have been properly notified form of which notice is shown on the other side of this sheet.

"It is needless for us to say that our sales connections must not cut price on these products, nor countenance price cutting on the part of jobbers or their salesmen, directly or indirectly, and any case of infringement of our limitations as to retail selling price should be promptly reported with all possible particulars as to date of order, date of shipment, name of merchant, location, number of boxes, &c.

"Our salesmen, so far as it comes within their province shall make it clear to jobbers and their salesmen that it is our purpose to carefully and effectively enforce our policy by all proper and legitimate means within our (267) power."

Now on the back is the form of notice issued to jobbers of Old Dutch Cleanser: It reads as follows:

"The following is form of notice issued:

"To jobbers:

Old Dutch Cleanser and Dutch Hand Soap.

"We take this means of notifying you—as well as other jobbers—that it is our purpose to maintain a uniform selling basis from all jobbers to the trade (both retail and jobbing) in accordance with our published price list on Old Dutch Cleanser and Dutch Hand Soap, as per copies herewith.

"These goods, which bear our exclusive trademark, are widely and prominently advertised and known, which

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has established for them a certain fixed position and value.

"It is our purpose to admit only those jobbers who fully maintain these prices to the privilege of direct buying from us at full jobbers' discounts, and to such jobbers only will we give the benefit of the assistance of our specialty selling force.

"Kindly arrange it so that your salesmen or employees will thoroughly understand these price limitations, and that no business, directly or indirectly, will be done in violation thereof.

"We want to emphasize the fact that the interchange of stock, or the sale of Old Dutch Cleanser by one jobber to another, must be at full retail list only.

"We expect by the enforcement of the above conclusions to gain a practical benefit in increased business, both to you and ourselves on these products, and hope to merit the support and appreciation of your company (268) and other jobbing trade.

"Yours very truly,

"THE CUDAHY PACKING COMPANY,
O. D. C. Department."

Mr. SMITH: Here is the jobber's cost list that we were talking about in connection with that controversy. This one is dated January 1, 1910.

The COURT: You mean that yellow one?

Mr. SMITH: This is a copy of this (indicating another exhibit, not yellow in color) selling price to retailers and that is the jobber's cost. Here is the duplicate of jobber's cost, under date of January 1, and here is the selling price to retailers, which is a duplicate of that under date of January 1, 1910. It is the same price, and I believe we have read that, and I do not believe it will be necessary to read this now.

The jobbers cost and selling price to retailers in the book, Plaintiff's Exhibit 37 are as follows:



VS. FREV & SON, DEFT. IN ERROR.
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(269)

PLAINTIFF'S EXHIBIT NO. 37.

(Same as plaintiff's Exhibit No. 26, appearing on
page 169.)



(270)

PLAINTIFF'S EXHIBIT NO. 37.

O. D. C. No. 80

SELLING PRICE
TO RETAILERS

Old Dutch Cleanser

(Cases of 48 Sifting Top Cans)
and

DUTCH HAND SOAP (10c Size)

(Cases of 48 Cakes in Cartons)



For all territory

In and East of

the following states:

North Dakota, South Dakota, Nebraska, Kansas
Oklahoma, and Texas

Less than 5 cases.....	\$3.40	per case, ex-Jobbers' stock	} Freight will be Prepaid to all Railroad Stations
5 cases and upwards.....	\$3.30	per case.	
10 case lots and upwards...	\$3.25	per case.	
25 case lots and upwards...	\$3.20	per case.	

FREE DELIVERY—Freight will be prepaid for Factory Shipment (but not allowed from jobbers' stock) to all railroad stations in above named territory in quantities of 5 box lots and upwards of one or assorted brands of Old Dutch Cleanser, Dutch Hand Soap (either size) and Lilac Rose.

TERMS—60 days net, or 2 per cent discount for cash in 10 days.

QUANTITY values apply on orders for assortments of Old Dutch Cleanser and Dutch Hand Soap, (either size) and Lilac Rose, but must be sold to only one merchant for his sole use and in one delivery.

Prices are only for prompt shipment to one buyer, and in no case will orders be accepted for shipment beyond thirty days from date of booking of order.

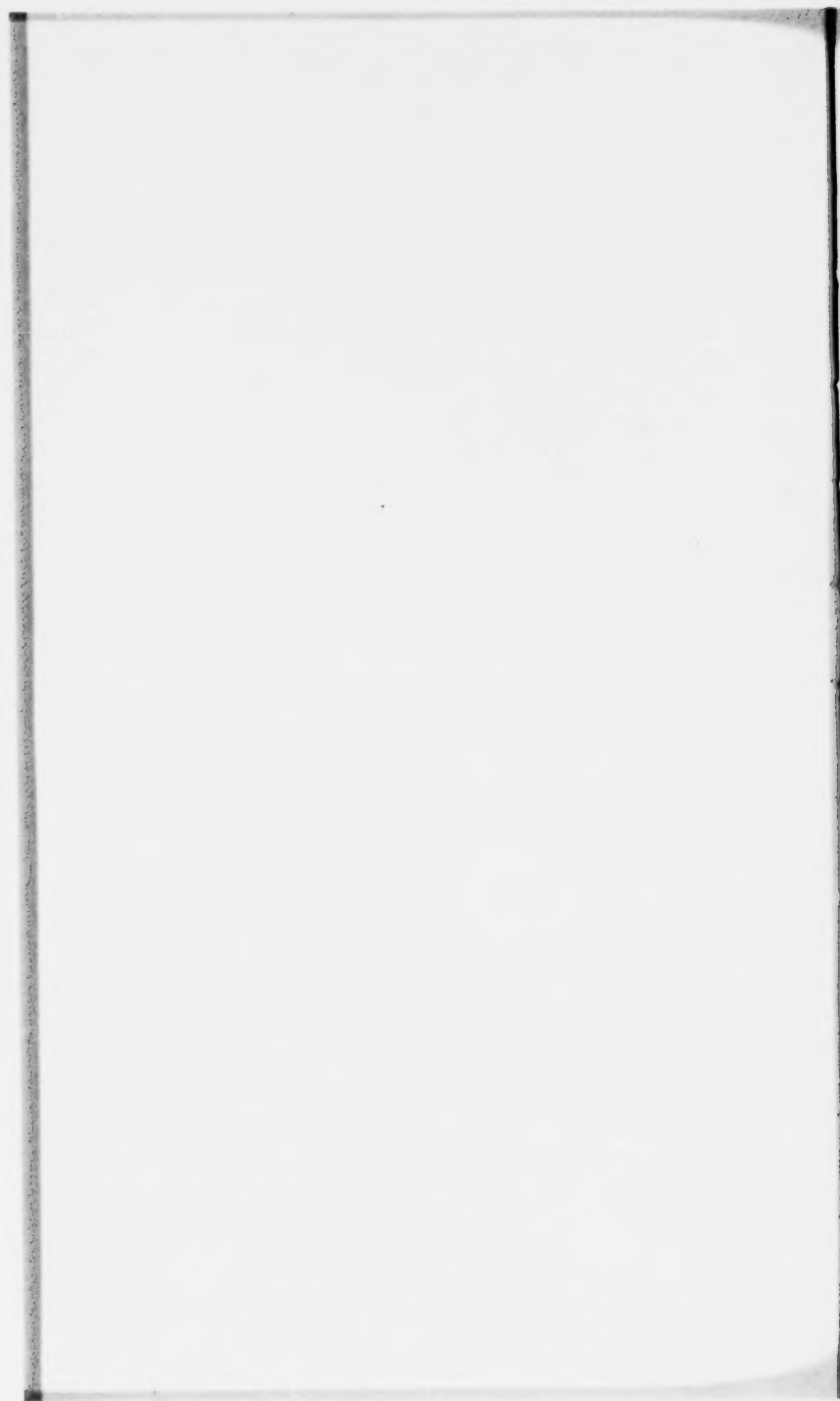
OLD DUTCH CLEANSER and DUTCH HAND SOAP will be sold at jobbers' prices to only such jobbers as strictly observe the retail selling prices in this list on all of their resales, whether to their regular retail trade or to other jobbers and distributors.

For retail prices in territory WEST of above see list No. 82.
For Colorado and Cheyenne, Wyo. See Special List No. 90.
This list supersedes and cancels all previous lists.

THE CUDAHY PACKING CO.,

January 1, 1910.

O. D. C. Department,
SOUTH OMAHA, NEB.



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(271) Q. (By Mr. BAKER) Now, Mr. Sonnehill, before I go on with the conference at the Emerson Hotel, I want to show you in this book the sale price to retailers, dated January 1, 1910, and ask you if that was in effect when you left the company? (Handing book to witness.) A. Well, this is to the retailers. As far as I know this has never been changed.

Q. (By Mr. BAKER) At the close of the testimony yesterday I was asking you about a conference that was held at the Emerson Hotel with regard to Mr. Frey. Who was present at that conference? A. At that conference that was held at the Emerson, there was Mr. Berry of Philadelphia and Mr. Philp of New York and myself. Mr. Philp was the manager from New York, that is, he had the New York division. The New York division perhaps comprised some part of New York, Philadelphia, Baltimore, Washington and perhaps Norfolk and Richmond, and maybe some other points that I do not know. Mr. Berry was stationed in Philadelphia as a sort of assistant to Mr. Philp. He is what is commonly called in this business a division man. Both were employes at that time of the Cudahy Packing Company. They were persons who were entitled to give directions to me. I was under their jurisdiction, both of them; Mr. Philp was the New York manager and Mr. Berry was the division man. I do not remember whether this conference was after the letter, a copy of which was offered in evidence yesterday. I was instructed to meet them at the Emerson Hotel and I complied with their request and either Mr. Philp or Mr. Berry started off and said that Frey was cutting the price. I had no evidence that he was, nothing that I could show that he was, and we argued for about two hours, more or less, about Frey cutting the price. We finally wound up by Mr. Philp and Mr. Berry agreeing that they would get some teamster to have him go down to Frey, Department C, and purchase these goods, give him cash to purchase the goods. They (272) argued as to whether the man should have the full amount or whether he should have a lesser amount, to purchase the goods with, that is to purchase Old Dutch Cleanser, the only thing we were interested in, I can not say what Mr. Philp and Mr. Berry did, whether they got a teamster and gave him the money. I can only say what happened at Frey's and about what Mr. Swift,

who is now dead, told me when I came in. That is the only way I can connect it up. I don't know whether I had any further conference with Mr. Berry and Mr. Philp about it. This was before Frey was cut off; we were selling to Frey at the time of this conference. He was not at that time cut off.

Q. You stated yesterday your duties in regard to going to retailers; what duties, if any, did you have with regard to seeing that wholesalers complied with the terms of these papers that have been offered in evidence here? A. In regard to what, particularly?

Q. In regard to the selling and the price, the maintenance of price? A. It was my duty to see that the price was maintained in every instance. Of course I used a great deal of discretion, I only looked for actual letters.

Mr. MONTAGUE: I object to that. The point is that his instructions speak for themselves and we would like to know what they were.

The COURT: Were they in writing?

Mr. MONTAGUE: They are all in evidence here, your Honor.

Q. (By Mr. BAKER) Were your instructions all in writing? A. Every time a division man or New York manager visited me the whole talk and subject was as to the maintenance of prices and what was going on in the territory. Those were sales talks. It was absolutely my duty to see that the price was maintained.

The COURT: Take something that you recall as nearly as you can, that is a typical conversation, and tell us (273) what occurred at that conversation.

The WITNESS: "Is Frey maintaining prices?" For example. "Frey is maintaining prices as far as I know." "Do you know of Frey cutting the goods?" "No."

The WITNESS: (Answering further questions) I was to report, as I understand it, about Frey and about others as to whether they were cutting prices or not. I never had any trouble down here with anybody else about cutting prices, no trouble at all with anybody. I never had any trouble with Banghardt; they were off of the list. If they were not off of the list when I came here, then they were three or four months after I came here.

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Q. Do you know why they were taken off from any one of the Cudahy Packing people? A. Not without you let me tell you the conversation of the New York man.

Q. I want all the conversation. A. It led up to their system of doing business down there, and what data I had that the prices of Old Dutch Cleanser were being upheld, whether they were billed at the long prices, the prices that were the same as any other jobber got. Mr. Girod was the New York manager at that time and he seemed to impress upon me that their method of doing business down there was such that they had seven hundred members of that Baltimore Wholesale Company, and he explained about declaring dividends and everything else. It was clear in my mind that I could demonstrate to him that it was a legitimate wholesale grocery and that they maintained prices.

Q. What did Mr. Girod maintain? A. As near as I remember, it was an argument about rebates. They may not have termed them rebates, but at certain periods they secured perhaps some compensation or some money back as rebates on goods they had purchased.

(274) Mr. BAKER: This is Banghardt that we are talking about now.

The COURT: They understood that in some fashion they were running a co-operative store and letting the customers share in the profits?

The WITNESS: My contention always was on that point, that the members of that Association had stock and that that was—

The COURT: And the other gentlemen, Mr. Girod, talking with you, thought that practically meant cutting the price and you were discussing that question with him?

The WITNESS: Yes. It did not suit the Cudahy Packing Company, the way they were doing business, that is the best way I know how to put it.

Q. Why didn't it suit them, did he tell you? A. I do not think it was necessary for him to go into those details with me.

Q. Why not? A. We argued that point innumerable times and finally Mr. Girod left the company and Mr. Baird succeeded Mr. Girod and Mr. Banghardt or Mr.

Gosaell telephoned to me and I went down there and they sent a wire out West, that is when I had charge of the field, and it was referred back to Baird in Philadelphia and he was reinstated with a car of Old Dutch Cleanser. He was cut off a long period of time; there were a number of months that he was cut off. The arguments, as near as I can say, were these: I thought the Baltimore Wholesale Company was a legitimate concern and that they had taken an entirely wrong version of the whole thing, that they did not cut prices, that every case that went out of there went out at the long price, as far as I could personally testify, that they were maintaining prices and I was on the field and I should know. Mr. Girod argued that they were cutting prices. He said that (275) their method of doing business, that there must be something wrong down there. Mr. Girod wanted to sell their concern through the private Broker in New York and Mr. Banghardt would not have it that way. He said that the Cudahy Packing Company had to sell it. I sold every wholesale merchant with the exception of perhaps maybe three or four when I was here in Baltimore. Mr. Frey always bought Old Dutch Cleanser during my administration. Mr. Frey never knew that he was cut off at the time that I testified yesterday that he was cut off. I don't know that I have any right to classify that he was cut off the list at that time. I simply stopped taking missionary orders for him and told him at that time—at least I didn't tell him anything, but I was cut off from taking missionary orders and was instructed not to go to see Mr. Frey.

The COURT: You say you served all but three or four, upon what basis, if any, did you discriminate or select three or four that you would not sell to?

The WITNESS: One or two of them, perhaps, or maybe three of them, it was a question of credit a question of quantity also, what they would buy. I might say that I do not think there would have been any objection on the part of the Cudahy Company if they paid cash. I did not make the selection the Cudahy people did that. I have no selection, it is the Cudahy people; I have no recommendations to make. I had discussions with the manager, we have often gone over those concerns and their names were mentioned. The purport of the discussion was that perhaps they were a little weak in credit, perhaps it was a question as to what quantity

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they could buy, and they canvassed a section where a ten-cent proposition was pretty hard to sell. Covering a period of time that I was not to deal with him I could not have taken an order from him nor gone near him. The Baltimore Wholesale Grocery Company that we have been talking about was a legitimate, wholesale grocery, (276) was it a co-operative association? They have lots of people that deal there that are members, maybe six or seven hundred of them. While I was here representing the Cudahy Packing Company, the wholesalers to whom I sold did not, to my knowledge, cut prices. They received the literature of the Cudahy Packing Company through the mail and sometimes, in a few instances, I can not just remember how many, they were given these price lists. This price list should be in the possession of every jobber (indicating Plaintiff's Exhibit No. 25). I saw it in their possession, from time to time, but I can not enumerate just the times. The jobber should have this one also in his possession (indicating Plaintiff's Exhibit No. 27). This the jobber has nothing to do with (indicating Plaintiff's Exhibit No. 26). This should be in the jobber's possession (indicating Plaintiff's Exhibit No. 24).

(Being asked so far as he knew that Exhibit No. 26 was not the one that was sent to the jobbers, witness said:) I never gave any to the jobbers; I retained them myself; I have never seen that with a jobber, but it would be usual for me to see the others.

Q. I will ask you if you know the object of issuing No. 26?

Mr. MONTAGUE: I object to that unless he can tell any conversation he had about it. These came from Chicago and this gentleman was operating here in this territory.

The COURT: I suppose it speaks for itself, though I have not read it. Do you know anything more about it than what it says itself?

The WITNESS: This is the cost to the jobber. The salesman, when he goes in to see the jobber, gives him the cost.

Q. I show you again Exhibits No. 24, 25 and 27, and

I ask you whether or not you at different times saw those in the possession of jobbers in Baltimore? A. Yes.

Q. I will ask you whether or not, in conversation (277) with any member of the Cudahy Packing Company, or the wholesalers or jobbers in Baltimore, anything was said about the wholesalers or jobbers of Baltimore living up to the conditions of these printed exhibits? A. They had to live up to them.

The COURT: How was that compulsion made known to the jobbers and wholesalers?

Mr. MONTAGUE: Would it not be better to say just what was said?

The WITNESS: From visits by the division man and visits by the New York man and around amongst the jobbers. Sometimes I was with the division man but I just cannot tell the time.

The COURT: Tell us, if you can, what you heard on an occasion; you may not be able to specify a particular jobber to which it was said, but what you heard said at any time to a jobber indicating to him that he must not cut his prices?

The WITNESS: I have heard Mr. Lorton, a division man from Philadelphia, of the Cudahy Packing Company, I have heard him tell the jobber very often in my presence that it was necessary to maintain prices, that the field could not be kept in a healthy condition unless the price was maintained. He was in the employ of the Cudahy Packing Company in 1901, as near as I can remember. He was not there a great while, maybe a year or more, but it was during his administration. The jobber in these conversations would answer along the lines that he appreciated that in order to get a profit out of it that he would maintain the prices, that there was no question on that score at all.

Q. Did anybody else from the Cudahy Packing Company besides Lorton ever have any conversation with the wholesalers in Baltimore in your presence on that subject? A. I can say this much, that the way it was often told to me by those fellows, it was their duty to go to the (278) jobber, was their duty; it was necessary for them to find out what the jobber was doing and I would find out what the retailer was doing. By what the jobber was doing I mean whether he was selling the goods at

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the price, to find out what he had to say, and whether he was giving co-operation. I don't think I had occasion to go to see any of the jobbers and talk with them about the question of price cutting. How many times I had conversations with the officials of the company in regard to the fact that the wholesaler or jobber carried out these printed instructions would be mere guesswork on my part. I wish you would not nail me down to that. A number of times would cover it.

Q. Can you give me some of the conversations that the officers of the company would have with you in regard to the wholesaler maintaining prices, other than the ones you have already given with regard to Mr. Frey and the Baltimore Wholesale Grocery Company?

Mr. MONTAGUE: By officers of the company, do you mean the officers of the corporation other than these men?

The COURT: The men that were superior to him and of the kind he has just described.

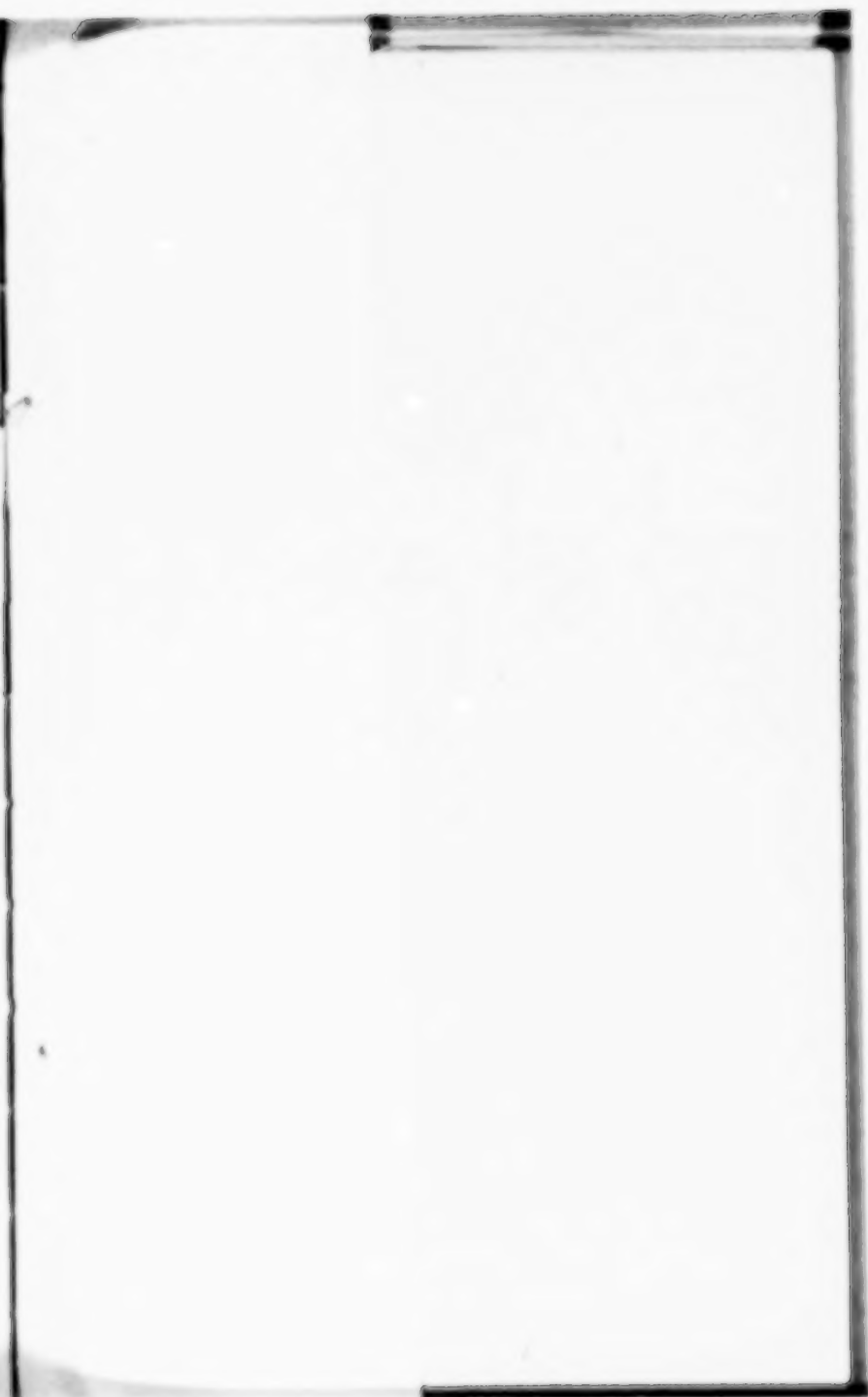
The WITNESS: On a number of occasions they asked me if the price was being maintained, and I told them yes, and furthermore it was my duty to report to them when I had anything of interest in the way of price cutting. That was my duty. I never reported anybody from mere hearsay; if I had no evidence I would not report it. So I never reported anybody. It would have been my duty to report if I had had any evidence. I would enclose it to New York. All my envelopes were addressed O. D. C. Department, New York, Cudahy Packing Company. Exhibit 38 that I identified yesterday and which was offered in evidence and which is headed "Confidential Information as to our Old Dutch Cleanser Marketing Plan and Price Productions" was the only confidential (279) paper I received while I was in the employ of the Cudahy Packing Company. There was a letter offered in evidence here which said that I was to acknowledge receipt of it and return it.

Q. Did you receive any other correspondence covering the period that you were employed here by the defendant company in which that was put at the bottom of the letter? A. I had a file, I think belonging to Mr. Meyerhoff, that was sent either by him or Mr. Baird, and asked to return it when they reinstated the Baltimore Wholesale Grocery. That was returned; that was

another instance of where letters were returned. During the period that I was employed here, there were no other letters written in regard to Frey & Son that had the request at the bottom to return, not to my knowledge. This paper, being a list of names, which you show me was sent to me with the names of various jobbers on it. It was customary for New York to send me a list of that way to be taken off of here and then placed on again, and we would strike them off and put them on. When I say "New York", I mean the Cudahy Packing Company, of course.

Mr. BAKER: I offer this paper in evidence.

(Paper referred to, having been offered in evidence, was marked "Plaintiff's Exhibit No. 39", and is as follows:



FOR THE FUTURE

H. J. Thoms, W.
 A. E. Pittella, W.
 Leonard Bros., W.
 Jackson Bros., W.
 W. & T. Parker, W.

DISCUSSION

[illegible]

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C. W. Coburn, III.

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W. B. Ferguson & Co.,
Riverside, Cal.
H. L. Parsons & Co.,
Riverside, Cal.

Carroll
Robert
 114
 VIRGINIA

New York

VIRGINIA—

J. H. Coffey, W.
 J. S. Doherty, W.
 J. H. King & Son Co., W.
 J. L. King & Son, W.
 J. L. King & Son, W.

Robert in order

CLIFFER—

Clifford & Co., W.

FRANKLIN—

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NEWPORT NEWS—

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NORTHOLK—

N. & R. Barrett, W.
 N. & R. Barrett & Co., Inc., W.
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 N. & R. Barrett & Co., W.

ORANGE—

Orange & Co., W.

PETERSBURG—

Petersburg & Co., W.

PORTLAND—

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RAVENNA—

Ravenna & Co., W.

ROBERTSON—

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ROBERTSON—

Robertson & Co., W.

Shapiro, Arnold & Co.

Shredburg
feed study
91
PENNSYLVANIA; Continued
New York

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The Hooven Merc. Co. (Br.), W.
Royal Who. Gro. Co., W.

POTTSTOWN—
W. Auchenbach & Son, W.

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Shredburg

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W. Young
good, feeders from

90
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 Balle Bros., 400 No. 2nd, W.
 Barber & Perkins, 33 N. Water, W.
 M. A. Bradley, 329 So. Front, W.
 Comly, Flanagan & Co., River Front Stores, W.
 James Crawford, 19 W. Girard Ave., W.
 Eisman & Son, 317 No. 2nd St., W.
 J. Gillespie & Sons, 149 No. 2nd, W.
 Gilheiss, Rexamer & Co., 40 So. Front, W.
 Girard Gro. Co., 272 Source Bldg., W.
 S. Goldmann, 3rd & Spruce Sts., W.
 Henry Graham & Co., 315 No. 2nd, W.
 J. Graham & Son, Co., 315 No. 2nd, W.
 W. J. Graham & Co., 383 No. 2nd, W.
 J. Greenberg, 383 No. 2nd, W.
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N. E. Street.

J. J. Jones

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F.P. Dickerson

10. 11. 2001

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General Motors Co. W.
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15
DISTRICT OF COLUMBIA
New York.

WASHINGTON—

Compton Bros. W. 2530 M St. N. W., W. 1105 7th St. E., W.
J. E. Dyer & Co., 454 Penn Ave., W.
Wm. B. Dyer
Frank House Co., 454 Penn Ave., W.

M. Mazon, W.
Miller, Chas. & Co., 2211 M St., W.
Geo. W. Offutt & Co., W.
N. H. Sheen, 1652 Penn Ave., W.
The P. H. Sheen Co., 711 & Florida Ave., W.
H. M. Wagner & Co., 11st & H St. N. W., W.
Washington W. Co., 11st & H St. N. W., W.
Washington W. Co., 11st & O St., W.
S. E. H. Co.

14
DELAWARE

New York

GEORGETOWN—
Layton & Layton, W.

LAUREL—
C. E. Woodson Co., W.

MILFORD—
Jos. E. Holland, W.

WILMINGTON—
J. T. Clark Co., W.
A. J. Hart Co., W.
Harvey Holstein, W.
W. B. Mercer, W.
Wm. D. Miller Co., W.
Thos. J. H. Richardson Co., W.
J. D. Slater Co., W.

Stoughton
who was Leo

SS-06-07

13
CONNECTICUT, Continued
New York

NORWALK—

The Holmes, Keeler & Sebeck Co., W.

STAMFORD—

H. M. Root, W.

WATERBURY—

Andrews, Douglas & Co., W.

W. H. Wood, W.

The Warren L. Hall Co., W.

M. S. W. 20 Canal St.

Roberts, Gilbert & Co. (Br.), W.

S. S. W.

R. E. Jackson

WILMINGTON—

Shaw & Harrington, W.

7-8-23-24-25-28-30-31-36-40-52-53

*Samuel
Shaw & Harrington & Co.*

PLAINTIFF'S EXHIBIT NO. 39.

12

CONNECTICUT

New York

BRIDGPORT—

Miley, Lord & Tallock (Br.), W.
Lyle & Penhallow Co., W.
Stoddard, Gilbert & Co. (Br.), W.
David Truitt & Co., W.
The Wm. Berry Co., W.
J. W. Kellogg & Co., W.

DANBURY—

The D. O. Penhallow Co., W.

HARTFORD—

E. H. Perry & Sons, W.
The Wm. Boardman & Sons Co., W.
The H. N. Fitzsimond Co., W.
The E. & K. Kirtland Co., W.
The E. & K. Kirtland Co., W.
The W. A. Alvord & Son, W.
H. H. Brock, W.
Barnes & Co., W.
Trucker & Goodwin, W.
Tulip, Tott & Tullin, W.
E. G. Whiteley & Co., W.
The Williams & Carrou Co., Mfg. Drs.

MERIDEN—

Miley, Lord & Tallock (Br.), W.
P. T. Sutcliffe Co., W.

NEW BRITAIN—

Miley, Lord & Tallock (Br.), W.
Amesbury & Co. (Br.) W.

NEW HAVEN—

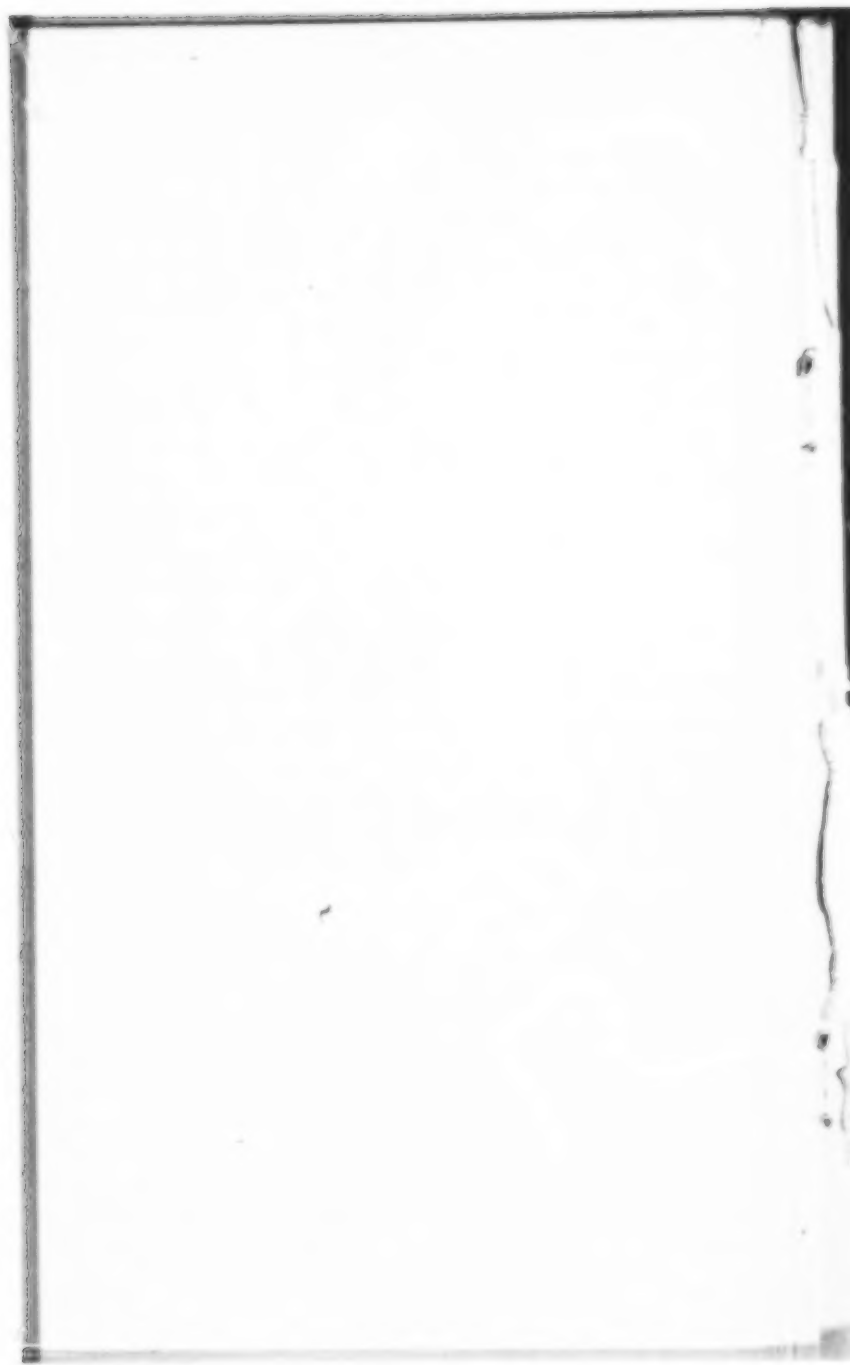
C. C. Andrews & Co., W. Brct.
The W. C. Hushell Co., W.
The W. C. Hushell Co., W.
Miley, Lord & Tallock, W.
Stoddard, Gilbert & Co., W.
N. Solway, W.
Stoddard, Gilbert & Co. (Br.) W.
Stoddard, Gilbert & Co. (Br.) W.

NEW LONDON—

N. N. Ellis Co., W.
Humphrey, Cornell Co. (Br.), W.

NORWICH—

The L. A. Gallup Co., W.
The W. C. Hushell Co., W.
Stoddard, Gilbert & Co. (Br.), W.



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(299) The WITNESS: In this book, under the head of "Maryland-Baltimore", on what is apparently page 43, these names represented the jobbers of Baltimore, some of them perhaps stricken out because they were not in business. One here is marked C. O. D. I marked them. I marked that "C. O. D.", because it was a question about his financial standing. I made the erasures on there. You ask me were *the* made from my motion in all instances or by direction of the Company in all instances, or were they sometimes made by me and sometimes by the Company? They originally got that list up and it was sent from New York and when that list arrived what I was interested in most was Baltimore and Maryland, that is parts of Maryland, and there were a lot of jobbers, old jobbers that had been in business here and had since gone out of business, and some of those erasures were from those concerns that were not in existence. So that when this list came to me as the authorized list of jobbers or distributing agents, or what not, it contained a number of names of persons who had gone to the financial graveyard in some way or another, or retired. There is a light line through the words Frey & Son, because I was told to stay away from there, and Frey was on and off; I was told not to go there, and then I resumed pleasant relations there and continued. That light line I suppose was drawn there by me at that time, but it is so far back that I can't remember.

The COURT: You said in some other part of your testimony that there were two or three or four Baltimore wholesale grocers or jobbers that you did not sell to; tell us whether the names of any of them are on that printed list.

The WITNESS: For instance, here is a jobber, Lipschutz & Sons; they didn't appear on this list at all. As near as I can tell here the Baltimore Wholesale Grocery Company's name does not appear on this list at all. As near as I can tell here the Baltimore Wholesale Grocery Company's name does not appear on this list at all. That is a firm that we did not sell to and afterward placed them on the list again.

(300) The COURT: Was there any wholesale grocer of undoubted credit whose trade was such that it could handle, in your judgment, an appreciable amount of Old Dutch Cleanser whom you declined to sell?

The WITNESS: No sir. This list here does not enb.

stantially contain all the wholesale grocers in Baltimore. The Baltimore Wholesale Grocery Company are now down here, and then I might add there have been in recent years a few that have come to the front and are buying merchandise.

CROSS EXAMINATION.

By Mr. MONTAGUE:

The WITNESS: (Being questioned by counsel): When I first received Plaintiff's Exhibit No. 39 there were no marks or lines in it to my knowledge. All these marks and lines in it to my knowledge. All these marks and lines might or might not have been put in by me after I received it, I really could not answer that.

The COURT: The witness's testimony on that point, as I remember it, is that he can not remember whether there were some corrections made at the office before it was sent on, or whether he did all the striking out.

The WITNESS: There is lots of trade there that I was not interested in over all the different states.

Mr. MONTAGUE: This comprises states running from Connecticut to New York and Virginia and Pennsylvania, your Honor.

The WITNESS: (Answering further questions): So far as Baltimore is concerned it did not contain an absolutely complete list of all the wholesale jobbers here. It was given to me at the time I received it as a list of jobbers with whom Cudahy was at that time dealing in Old Dutch Cleanser. It contained merely all the names of such of them as they were dealing with. There were three or four at least, I should imagine, who were not on that list. Occasionally one would be taken off because his credit might be gone and then one might have a warning against him, C. O. D. and so on. The majority of those strikes there have all been stricken off and represent concerns that have gone out of business, like Fischer & Sons, and all those concerns; they were out of business when I came here, I believe. I never found any evidence in Baltimore of any cutting of price by any of (302) the Cudahy distributing agents handling Old Dutch Cleanser during all the time that I was with the Company, to my best knowledge and belief, so that on that point I never had occasion to report anything to anybody. I cannot remember now whether I ever had

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any discussions with any of the jobbers on that subject. That is something I can't remember. I can follow it up by this: You must know that in a field like I was in here, I understood the conditions down here thoroughly, I thought I was master of the situation, and the fact was it didn't make any difference what the jobber told me, I had absolutely to know myself and when I went to headquarters I had to have documentary evidence to show them and not mere guesswork.

The COURT: By documentary evidence, what do you mean, that you had to get hold of bills that he had given the retailer?

The WITNESS: That is the way I should think it would have been, where I would get hold of something with Frey's name on it where he had cut the prices, because if I listened to everything that everybody said to me about cutting price, I would be running around all the time and doing anything else. I paid attention to it if there was anything to it, if I could get hold of it, but I was never troubled with price cutting down here. A Mr. Lorton came down and I heard him discuss with the jobber the question as to what prices that man was selling Old Dutch Cleanser for and the jobber told him that there need not be any question on that score, that he, the jobber, would not make any profit unless he sold it at the long price of \$3.40 per case. In a number of instances that was the drift of the conversation. And when Mr. Lorton put the matter up to the jobber, the (203) jobber said, "You need not pay any attention to it, I, of course, sell at \$3.40 because I would not get the profit if I did not;" that is what he said.

Q. Now doesn't that pretty well describe the whole situation as you found it in Baltimore, that there was no question regarding price cutting and it was for the simple reason that people sold at \$3.40 because they wanted the profit? A. It is natural to assume that. That is what I found in all the three years that I was here.

Q. Was that \$3.40 profit which that jobber made, the jobber that Mr. Lorton was speaking of, excessive profit?

(Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the

witness not to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and eleventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. MONTAGUE: I will call your Honor's attention to the fact that this witness, in response to my friend's questions, has stated that they sold at the full price because they wanted a profit. Now we think it is fair cross examination to—

(304) The COURT: I do not think you should go into that, but if that is any defense, that a man kept that price because he wanted a profit, that has been proved. As I understand the decision of the Court of Appeals, the question of the reasonableness of the profit is not admissible. At any rate, I do not think this would be the man by whom to prove what is a reasonable profit to the jobber.

THE WITNESS: (Being further questioned): Questions of credit and questions as to the quantity in which wholesalers in Baltimore would stock up on Old Dutch Cleanser came up from time to time in the three years that I was with the Company.

Q. And when it was a question of adding to this list or taking off from it, sometimes I suppose the question as to the credit and as to the amount that this distributor would stock was discussed as well as other questions, were they not? A. There is only one man off of that list and he was hopelessly off; it was not a question of quantity, it was a question of financial reasons.

Q. I am thinking particularly of the wholesalers in Baltimore who were not on the list; did you ever speak to any one in the Cudahy Company as to whether they were to be added to the list? A. Baltimore wholesale?

Q. I am speaking of people who were not on this list; did you ever take up with the Company as to why they were not on the list? A. From these various discussions from time to time I knew why the Baltimore Wholesale Grocery was not on the list.

Q. You have testified that there were at least three or four wholesalers who were not on this list and also

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as to the question of how much they would buy. A. There were several jobbers here that were very small and the jobbers themselves never applied to be put on the list. I did not take it up with them. It was not (395) worth while. Perhaps we would work the City and we would not get but one or two missionary orders and we could easily put them through somebody else. The quantity of that business was not enough to make it worth our while to consider putting them on the list. As to the rest, it was a question of their credit.

At one time, while I was working for the company—and that by the way was from January, 1910, to September, 1913, I was told not to call upon Frey. I put that date March 18, 1913. They must have rescinded it or modified it after I was instructed; I don't know how I was instructed, but I continued then to call on Frey. Frey knew nothing about that at all.

Q. Did you, by writing, or by word of mouth, ever get any instructions from the Cudahy Packing Company to call on Mr. Frey after you got these instructions that you have testified to that you should not call on Mr. Frey? A. The best that I can remember about that, if I did call on Frey, I must have been instructed by either word or by letter to call on him, otherwise I would not have called on him.

Q. You were obeying instructions here, were you not? A. Absolutely trying to.

Q. You never had any dispute with the company as to your disobeying instructions, had you? A. Yes. There was a different policy through Mr. Carson's instructions that lasted about two months after the time that Mr. Philp resigned and Mr. Carson succeeded him. That was from June 26th to September 1st. Mr. Carson and I did not hit it off from the start; I don't think we ever agreed. He wrote me from New York, which letter I have, I brought it down at the first day of the trial, that seeing there was a difference of opinion, that I did not seem to promote the proposition as he saw it, he thought it was best for me to resign and I resigned, I think it was some time during August, perhaps the early part of August my resignation was put in to take place some time in September. This period in March, I was obeying instructions working under Mr. Philp's (396) administration.

Q. According to your view you were always obey-

ing instructions, it was just a difference of view between you and Mr. Carson, was it? A. Mr. Carson, wrote me a very pleasant letter that I have in my possession, just the facts of the case.

The COURT: Did you have any difference in view point as to the way of disciplining price cutters?

The WITNESS: No, sir, absolutely not. There was no particular difference with Mr. Carson, except this: There had been changes of administration continually with the Cudahy Packing Company; first one man was in the New York office and then there was a different man and a change in administration, and some other fellow was in. The records were all made under one man and as the next man would come in there was a record to make for him. Mr. Carson's administration started in the summer time. The work that we had to do at the most was very heavy work; there was a great deal of advertising and it was seeing the retail trade and the jobbing trade, and it was a combination job, that I do not think is acceptable to every missionary man. As far as I can remember the starting of it was in regard to the advertising, how it should be placed and how the territory should be worked, and the territory was supposed to be mapped off by me. At any rate Mr. Carson asked for my resignation and I gave it to him. It was not very long after I received from the Cudahy Company in March instructions not to call upon Frey that I again resumed calling upon Frey and giving him orders, or taking orders from him. I couldn't say the time. If it had been any length of time Frey would have applied for goods. It was such a short time that Frey did not know about it at all, not to my best knowledge and belief, he did not.

Q. Something has been said about the Baltimore Wholesale Grocery Company and the difference between you and Mr. Philp as to whether the Baltimore Wholesale Grocery Company should be included in this list, or should be left off of this list? A. That was during Mr. Girod's time.

Q. Were they ever added to the list in your time? A. Yes, we continued on. I did not put it down on that list.

Q. They had been on the list before and the question was as to whether they should be kept from the list? A. The Baltimore Wholesalers never appeared on that list.

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The WITNESS: (Answering further questions): I sold Old Dutch Cleanser to the Baltimore Wholesale Grocery Company while I was in the employ of the Cudahy people. I began to sell them after Mr. Girod's administration and during Mr. Baird's administration. As near as I can remember it would be 1911. I continued to sell them up to the time I separated from the company. I did not put them on this list because it was not necessary. To my recollection I had no instructions to add them to the list.

Q. Did they not regularly send you something in the nature of instructions whenever they added a man, and didn't they there state that you should thereafter go and call on him? A. These lists came down from New York and I signed them and sent them back from time to time. Some were added and some were not. I did not abide by that list. I mean by that that that was not official, as far as I was concerned. I knew who the jobbers were down here and who I could not sell. I was trying when I first got that list to keep it up, but I afterward fell back on it. This list has not any significance at all, absolutely none.

The COURT: Except it is a list of people that the Cudahy people sent to him originally as being the people they were willing to deal with.

Q. You said that there was a dispute between you and Mr. Girod as to whether you should sell the Baltimore Wholesale Grocery Company; is the Baltimore (308) Wholesale Grocery Company, and was it at that time, what is known in the grocery trade as an exchange, or how would you describe it? A. The Baltimore Wholesale Grocery Company at that time was a perfectly legitimate wholesale grocery, so far as I know.

Q. Wasn't it a fact that at that time the Baltimore Wholesale Grocery Company was a kind of an association to which retail groceries belonged, they subscribed to stock and then they bought from the Association, that is the Grocery Company, and the Grocery Company gave them dividends back; wasn't that the course of business as you understood it? A. I can not state the time, but it seems to me that it has been a long time back, owing to the repeated demands of the various manufacturers, it was changed from the Grocers' Association to the Baltimore Wholesale Grocery, but if my memory serves

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me correctly, during my term down here it was always known as the Baltimore Wholesale Grocery. It has been quite a number of years back, but I can say when Mr. Banghardt went to New York, and the way I got it was at the suggestion of Mr. Rogers, or one of them, the New York Condensed Milk Company, that they suggested that he simply change the wording of the concern, and I think it was done. That is my opinion of it, but I don't know that that is true. The fact is supposed to be that it is the retail grocers who are the stockholders and who really run it. The only concern that I know that did not sell them was Kellogg, and they afterward sold them.

Q. There is a considerable dispute among wholesale grocers and retail grocers and associations run by retail grocers as to whether retailers, when they get together in an association or in a corporation and want to buy, should be given the price such as retailers get, or should be given the wholesale price. A. They are always objectionable; the trend of the manufacturers has always been (309) ignore them; they do not care to sell them as a general rule. Cudahy did eventually sell them, and I think that question was eventually decided correctly when they did decide to sell them, I think they did the right thing.

Q. So that on that point, so far as you had a dispute with Mr. Girod on that point, your opinion eventually prevailed over his? A. I would like to follow that up and explain that to you more concisely. In an association with seven hundred members, seven hundred retail grocers, when you are going around there are lots of these fellows that absolutely refuse to handle your merchandise except through the firm that they want it from, and that was not only interfering with my work, but interfering with the other salesmen's work. We perhaps may strike two or three weeks in that section where it was hard to get business, simply because they belonged to that association, and often times we would turn them over to some other jobber and where we couldn't handle them we would have to pass them up. They were distributors. I consistently stood for the proposition that the Cudahy Company ought to quote to the Baltimore Wholesale Grocery Company the same price for Old Dutch Cleanser that it quoted to these other distributors. I eventually went and sold them anyhow.

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Q. And that was in spite of the fact that there was given by the Baltimore Wholesale Grocery Company a rebate in the form of a dividend to each one of those seven hundred retail grocers, wasn't it?

The COURT: It is already proved in the testimony that they did get their dividends.

Q. Do you recall any visits that you made to Mr. Frey after you were first told by some of your New York people or some of the Philadelphia people that they had suspicions that Mr. Frey was selling below \$3.40? A. I don't quite catch your question.

(310) The COURT: Didn't you say this morning that you had to visit Frey, after that conversation about sending a teamster down, didn't you say that you went down there and had a talk with Mr. Swift, the gentleman who is now dead?

The WITNESS: Yes, as I passed through the cash department, department C, Mr. Swift said he had a visit of a teamster that had been in the habit of hauling some goods for some concern that dealt there, and this teamster had offered him less money that he wanted in cash for Old Dutch Cleanser, and he asked, if I remember right, who he wanted it for, and he told him this particular grocer, whoever it was, and Swift said he thought it was very unusual that this fellow had recently got a supply. He asked this fellow who sent him down there and somehow or other this fellow got weak-kneed and told him that two men had met him on Light Street and sent this team down to buy this Old Dutch Cleanser for cash. Well, he didn't get the Old Dutch Cleanser.

Q. That satisfied you, did it not, that Mr. Swift was not selling Old Dutch Cleanser to any one below \$3.40? A. I don't know. It is just a question of how a man feels. I have nothing to show. I felt that if I went to the Cudahy Packing Company with a complaint that I had to back it up by something substantial.

Q. Did you feel satisfied with that explanation, and did you say to yourself, Mr. Frey has been unjustly accused, or did you still suspect that Mr. Frey was doing it? A. I said nothing.

The COURT: You are dealing with two different situations, the one the attitude of the mind of the people in

the executive offices of the company who had their own theories as to the value of maintaining prices and what not, and the other the Baltimore salesman, who is probably principally interested in a large output.

(311) Mr. MONTAGUE: If I have indicated or seemed to indicate any curiosity to get from this witness the opinion of anybody else, I have not framed my questions properly.

The COURT: He wants to wait until the evidence is such that he has got to let his company know it, but he does not want to inquire too carefully, that is about the attitude.

Q. Did you at any time speak to Mr. Frey and inquire from him whether he was selling below \$3.40 or not? A. I think that during my career in lots of instances Mr. Frey said as far as he knew he was maintaining the price,—not selling \$3.40. Just when and where that was I could not tell you.

The WITNESS: (Being further questioned): I don't remember ever talking to Mr. Swift more than once about selling below \$3.40. I do not remember any other conversation than this. I can't state how many years I have known Mr. Frey. It has been quite a number of years. I am a Baltimorean born and bred. I have known him ever since he was a law student. I have known him quite a long while. My relations with Mr. Frey are very friendly. They always have been, on my part. I have not had any such unpleasant experience with Mr. Frey as I had with Mr. Carson. I knew him before I began to enter the employ of the Cudahy Packing Company. I was intimate with Frey only in business relations. After I began to sell him Old Dutch Cleanser, I saw him oftener, whenever I had business to go in there on; whenever the occasion arose and when I asked if he wanted to buy goods, I did not go in on any personal visits. I ceased selling Old Dutch Cleanser in September, 1913, as near as I can recollect. I have seen Mr. Frey since then innumerable times. I don't think I have been to see Walter Frey for three weeks, maybe four weeks. Since the first of the year I have seen him, perhaps a half a dozen times. I recall when this suit was begun. He did not speak to me before he began this suit, nor, for a long time afterwards. I read that long article of his in

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(312) the Journal of Commerce the week before he began the suit, in which he said he was going to begin it.

Q. What did you do after that, did you ever talk with him after that? A. I want to set you straight on this proposition; you are working on wrong lines and it may save you trouble. I am affiliated with Henry C. Schwab in the merchandise brokerage business and Mr. Schwab calls on Frey and he is not a customer of mine. Now perhaps that will help you. You are headed on the wrong trail and perhaps Mr. Schwab may need Mr. Frey, but I do not.

Q. Now, having said that, please answer my last question. After you read this article in the Journal of Commerce, which was before the suit, did you have any talks with Mr. Frey? A. I can't answer that. That is impossible for me to answer. I don't remember. I would like to answer your question, but I don't remember.

Q. Are you prepared to swear that from that date, which was in May, 1915, up to this time you have never mentioned this suit to Mr. Frey?

Mr. BAKER: He has not said any such thing.

The COURT: He said he had, in fact.

Mr. MONTAGUE: No, sir, he said that he had talked with Mr. Frey and had visited Mr. Frey and had seen him a number of times, but he did not say when it was.

The COURT: I can not see that it makes much difference. Go ahead.

Q. How many times have you talked with Mr. Frey since then about the suit? A. Perhaps four or five or maybe a dozen occasions, say a dozen occasions or maybe a half a dozen times.

Q. Did you ever go up to the office of Mr. Smith, the attorney for Mr. Frey? A. The day before this case came off, I did.

(313) Q. Did you ever go up there before? A. I never saw Mr. Smith in my life.

Q. Had Mr. Frey ever called you upon the telephone and discussed his case with you? A. I don't remember whether he had discussed the case or not. I do not see why he would have discussed this case with me.

Q. I do not see why he should either; none of us see why he should. A. He might have asked some information, if that is what you are getting at, I don't remem-

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her just exactly what he asked. I may say this, that I could not enumerate the times or the dates or the place.

Q. When did Mr. Frey first apply to you for information for use in this case? A. I don't know whether Mr. Frey applied to me for any information.

Q. Did he or didn't he? A. He might have, I don't know.

Q. He might have and you might have forgotten it?

A. Yes.

Q. Did he ask you for any papers? A. Yes.

Q. When did he ask you for papers? A. That I can't remember.

Q. Was it a year ago, or was it day before yesterday? A. Some papers that they have over there I brought into court on the day of this trial, and I think some Mr. Frey had already gotten from me. If my memory serves me correctly they were simply price lists.

Q. We all know that you brought them into court, but what I want to know is when he first asked you for those? A. I don't know.

Q. And you can not tell whether it was a year ago or day before yesterday?

(314) Mr. SMITH: Isn't this wasting a lot of time? Is it all material?

The COURT: I do not feel quite justified in expressing whatever positive opinion on that I may have.

Q. And you can not tell whether it was a year ago or day before yesterday? A. Sometime ago, it has been quite some while back; I think I gave Mr. Frey some price lists, if my memory serves me correctly.

Q. About how long ago? A. I can not tell, say six months or a year ago. And the balance of the papers I brought here with me. When he asked me for them he asked me if I had in my possession any of these price lists. I said I would hunt them up, hunt up my old papers and if I could find any around I would be very glad to give him whatever I had. I was very glad to give them to him because they were no use to me and they might have been of some use to him.

Q. Why did you want to help him? A. Those papers were absolutely of no use to me, I don't know of any particular reason why. I would help anybody here who would ask for anything that I had that was of no value to me. Why shouldn't I try to help him?

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Q. Why did you want to help him?

(Objected to.)

The COURT: He said it was something that was of no particular use to him and a gentleman he knew, whose firm he had some business relations with, asked him for something that was of no use to the witness and he said he simply complied with it.

Mr. MONTAGUE: I note an exception

The COURT: To what?

Mr. MONTAGUE: To your refusal to allow me to press that question to the witness.

The COURT: Very well.

(315) To the sustaining of the plaintiff's objection aforesaid, to which exception was noted and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and twelfth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. (By Mr. MONTAGUE) Did you think these were going to help the Cudahy Packing Company? A. There is nothing in common between the Cudahy Packing Company and myself, but there was every reason for me to comply with Mr. Frey's request if I could. As far as these price lists that Mr. Frey got from me are concerned, he could have gotten them from other people; if he had searched far enough he could have gotten them without coming to me. It did not occur to me to tell him that. It occurred to me to comply with his request immediately and I did it. The first thing when I saw there was a chance to give something to Frey to help him in a case against the Cudahy people it was natural for me to comply. After I had given those to Mr. Frey I did not have any talks with him about them, not to my knowledge. I might have talked with either Mr. Frey or some one from his office or in his behalf in connection with this suit explaining any of those papers.

Mr. MONTAGUE: Now it is beginning to come back to you.

Mr. BAKER: I object to that statement.

The COURT: Mr. Montague, you are insisting upon pressing the witness closely and I will request you to refrain from any comments.

(316) Q. (By Mr. MONTAGUE) Is it beginning to come back to you? A. I might have discussed it. I suppose I did. If I did I will tell you.

Q. Is it now beginning to come back to you that you did discuss with Mr. Frey these papers? A. I said I absolutely did not discuss them with Mr. Frey; I might have talked with somebody on the outside, or perhaps at the time the case came up it might have caused some comment, as near as I can remember; if I ever expressed myself it was to the effect that I hoped it would not come to trial, that I hoped that they would in some way, shape, or form patch this up and compromise it, and I hoped I would not have to appear on the stand.

The WITNESS: (Continuing): I hoped it would be settled, and it was none of my business how it was settled. I spoke to Mr. Owens, I think, at one time; I thought he could get Cudahy and Frey together, that it would be to his interest to have everybody in the field satisfied. I have no recollection of making that suggestion to any one else. I first met Owens when he was employed by the Cudahy Packing Company in Baltimore by Mr. Lorton. I met him on the street, I think. I suppose I must have begun the suggestion of settlement.

Q. Coming down to your part in the preparation of this case, did you—

Mr. BAKER: I object to that statement on the part of counsel.

Mr. BOWIE: He has already testified that he helped to prepare it by producing papers.

The COURT: Now, he did not use those words, but he said he conferred with Mr. Frey about the case and some time ago, six months or a year ago, at Mr. Frey's request, he furnished these price lists and that the day before the case began he went to Mr. Smith's office, counsel for Mr. Frey, and was there some while.

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Whether that is or is not a part of the preparation of the case, there is no use in using that particular phrase.

THE WITNESS: I might add in that statement, I might have said something to Tom Grace about seeing Frey and I thought they could patch up their differences and put him on the list again. I might have begun that conversation.

Q. When did you first tell either Mr. Frey or any one connected with Mr. Frey in this case about this Hotel Emerson conversation? **A.** Mr. Frey never knew anything about the workings as far as I was concerned, or the Cudahy Packing Company. He never questioned me as to what the conditions were or the relations were during my administration. I do not think that question was discussed at all, as far as I can recollect. I don't think Frey went through this case, he didn't ask me what I knew about the case and he never asked me any questions. As far as the lawyers are concerned, I testified that I saw them the day before the trial at the solicitation of Mr. Frey.

Q. When did you first tell either Mr. Frey or any one connected with Mr. Frey in this case about this Hotel Emerson conversation? **A.** I do not think that I ever told Mr. Frey. I might possibly have, while Mr. Frey was present and Mr. Smith and Mr. Baker; I don't remember saying that, perhaps I did and perhaps I did not, I don't think I did say anything about this meeting. I have some notations there or papers that I brought and I think this was brought out by the question of Mr. Baker at the trial table.

Q. You say you have some notations? **A.** I had some.

Q. Where are they; are these they? **A.** Those notes were made after I left Mr. Baker and Mr. Smith and Mr. Frey.

(318) **Q.** Did you bring around any papers besides these which have been admitted in evidence? **A.** Yes, I have letters there from Girod and from Philp and from Carson and from Baird.

Q. Did you have any talk with Mr. Frey or with Mr. Smith, or with any one connected with Frey & Son, as to these letters before you brought them around? **A.** No.

Q. Did you tell them that you had them? **A.** I don't think I did.

Q. Did you tell them that you had any letters? A. I don't know; I can't recall; I don't think I did.

Q. Don't you know, as a matter of fact, that you did tell some one connected with Mr. Frey months ago that you had price lists and papers and that you would produce them if they wanted them? A. I might have and might not have.

Q. You are not prepared to swear that you did not? A. I am not.

Q. And you do not want to swear that you did? A. I don't remember.

Q. Do you wish to change your testimony given a moment ago to the effect that neither Mr. Frey nor any one connected with Mr. Frey in this case ever asked you any question about it until the conference in Mr. Smith's room?

MR. BAKER: I object to that, as the witness has never so testified.

THE COURT: I think that is fair objection.

MR. MONTAGUE: He did say this, your Honor, and if I am incorrect I want it cleared up; that at no time did Mr. Frey ask him any question about this, and I want to make sure that the witness does not wish to change that statement.

THE COURT: Wasn't that confined to the Hotel Emerson?

(319) THE WITNESS: Perhaps I misunderstand what you say, Mr. Montague. Mr. Frey has not talked to me about the case. He asked for these price lists and I gave him the price lists.

Q. Am I to understand, and is this jury to understand that without any questions from Frey you went to him and volunteered all that information?

MR. BAKER: I object to that question as unfair.

THE COURT: I think the jury is probably able to judge about the fairness and unfairness of the question; I do not care to express any opinion of mine about it. I very unpleasant to him often, but on cross examination has been fair or not.

Q. Am I to understand and is this jury to understand that without any questions from Frey you went to him and volunteered all that information? A. You are trying to confuse me Mr. Montague. I think Frey

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asked for it; I think I previously testified to that. I am trying to testify to what I know, but your questions are confusing.

MR. MONTAGUE: I am sorry if they confuse you.

THE WITNESS: They do. I am trying to get over this thing the best I can.

THE COURT: Unfortunately, a witness that is brought into a court to testify to anything and whose testimony is of any special importance to the case has to stand a good deal of that. It is pretty hard on him sometimes and very unpleasant to him often, but on cross examination the Court can not interfere very much.

THE WITNESS: I am going to try to answer as intelligently as I can.

Q. Am I to understand and is this jury to understand that without any questions from Frey you went to him and volunteered all that information? A. I testified before that he asked for the price list.

(329) Q. And you did not reply, or suggest, in response to his question, that since he could get this information from other people that you would prefer that he would go to those other people rather than to you, a former employe?

THE COURT: In the interest of time I can not allow that question. You have asked it before.

THE WITNESS: (In answer to further questions): I am now in the grocery brokerage business. Our house does business with Mr. Frey. My employer, Henry C. Schwab, gets the orders from Frey. In some instances I have done it—very rare instances. I do not make a habit of calling on Frey. He buys a fair amount of merchandise from us. I do not get any commission on the orders from Frey. Schwab has known Frey longer than I have.

Q. How many larger accounts than Frey's have you? A. I don't know. I never figured that out, whether there was any larger here, or how he stood. I don't believe we ever enumerated the accounts as to the volume of business.

Q. How many accounts does your house carry, would

you say? A. I guess we sell everybody here worthy of credit.

Q. Frey is one of the biggest wholesalers in Baltimore, isn't he? A. He is a very large wholesaler, yes.

Q. He is the biggest, isn't he? A. That is a difference of opinion.

Q. You differ with him when he said he is the biggest, do you? A. He does not do the biggest bulk of business here, in my mind, but I may be wrong.

The WITNESS: (Answering further questions): He might possibly be classed among the first four or five accounts in size. While I was in the employ of the Cudahy Packing Company from January 1, 1910, to September 1, 1913, I previously testified that I canvassed the retail trade to get orders for Old Dutch Cleanser. I turned in some such orders to Frey. At that time there were quite a few men assisting me in getting orders in the Baltimore territory.

Q. You were not connected with any other department except the Old Dutch Cleanser department, were you? A. No, sir.

Q. Your relations with them were continuous throughout this period? A. Yes.

Q. And always in this territory? A. Yes.

Q. When Frey & Company were mentioned by the retailer as the jobber that he wanted, that the retailer wanted to get his Old Dutch Cleanser from, you turned in such orders to Frey, didn't you? A. With the exception of the period that I was notified not to go near Frey, or to solicit orders for him.

Q. That period was so short. It was only a few days, and so short that Frey didn't know anything about it, you have testified? A. So far as I know he did not.

Q. And the rest of the period was over three years, wasn't it? A. I think so.

Q. Excepting that period of a few days, which was so brief that Frey never knew anything about it, didn't you turn over to Frey all orders which you got from retailers when they told you that they wanted to get it? A. Yes.

Q. Those orders were all straight *bona fide* orders, weren't they? A. What do you mean by straight *bona fide* orders?

Q. I mean orders that had actually been given you

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(322) by retailers? A. I presume they were; I don't know.

Q. They were not orders that you went out and forged the names of retailers on, were they? A. No, sir, I never forged any names.

Q. They were all orders that had been actually signed by the retailers? A. Yes.

Q. And you supposed they were real orders, didn't you? A. If I spent my time with a man getting those orders I would imagine they were good; I would hate to think they were otherwise.

Q. And you turned them over to Frey as being real orders? A. Yes.

Q. Do you agree with Mr. Frey's statement of yesterday that 50 per cent of all the orders he got in this period were fake?

MR. BAKER: We object to that; no such statement was made by Mr. Frey.

THE COURT: He did not say they were fake orders, he said about half of them would not take the stock when shipped. The word "fake" is the language of counsel.

Q. Do you agree with Mr. Frey's statement as it has now been repeated to you by the Judge, that 50 per cent of all the orders which you got from retailers and turned into Mr. Frey were orders which the retailers refused to take?

(323) MR. BAKER: The question is not, I believe, what your Honor thinks the question is. Mr. Frey testified that when they were brought in to him he was responsible and he had to either credit them or if they were cash orders the man would have to pay them. Now the question put here is not that; the question put here is whether or not he knew or believed the orders were turned down by the men themselves.

THE COURT: Your objection that it is is not proper cross examination will be sustained.

MR. MONTAGUE: I would like to make him my witness for that particular question and none other.

THE COURT: You can make him your own witness. That prevents you from discrediting him.

MR. MONTAGUE: I certainly do not wish to vouch for the credibility of the witness.

The COURT: That you will have to settle for yourself. I will rule that it is not proper cross examination.

(Exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now (324) prays the court to sign and seal this its one hundred and thirteenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: I don't remember that I was ever requested by Mr. Frey to investigate any orders which I turned in which I had received from retailers for the purpose of seeing why any retailer may have rejected the order and refused to take it. There were so many orders that passed through my hands that it is pretty hard to tell. We took a lot of orders during the year.

Q. Rather an unfortunate impression is created both on the mind of the canvasser like yourself and on the mind of the jobber like Mr. Frey, where the order comes in and the retailer refuses to take the goods, isn't that so?

(Objected to.)

The COURT: I do not think there is anything in the direct examination of this witness that makes that proper cross examination. I sustain the objection.

(Exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and fourteenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

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(325) The WITNESS: The paper on top of this bundle which is handed me is an order for five cases that I solicited on or about January 8, 1913, from Mr. C. P. White and which was accepted by Frey & Son.

Q. I will ask you to look through this bundle and see if you find any more five case orders.

The COURT: Are they all five case orders or not in that bundle?

Mr. MONTAGUE: I think they are.

Mr. BAKER: We object to this as not proper cross-examination.

(Objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which excepted was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and fifteenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. I hand you Plaintiff's Exhibit 37 and ask you when that book left your possession? A. I don't know. I can't tell you whether this was brought down or not.

Q. Was it a year ago? A. I don't know.

The COURT: Those are the price lists?

Mr. MONTAGUE: Those are the instructions issued by Cudahy.

The COURT: Did you turn that over to Mr. Frey at the time you turned over the price list?

The WITNESS: I don't know; it might possibly have been.

(326) Q. While you were in the employ of the company you kept in this book, did you, all instructions which were in writing, and on this form with the holes punched through it, which was sent you for the purpose of insertion in such books? A. Not in that book; there might have been some missing.

Q. Will you look through that book and see whether you can recall any instructions sent you which are not there included? A. Even without looking through this book I would not know from time to time of the various lists that I might have had lying around sometimes. The only way I could recognize anything in this book would be by reading it over and remembering that I had read it over before, and that there was something in here that was of interest enough to make me remember it. There might have been lots of lists that belonged in this book that are not in this book now. And lists which I had in my possession which were sent me and which I did not put in there. Plaintiff's Exhibit 24, which has some holes in it, was sent me for insertion in that book. I suppose I had a number of these. There might have been fifty or sixty or one hundred of them that passed through my hands. I did not always keep the current one in this instruction book.

Q. When Mr. Frey sent over and said he wanted some papers for use in this case, did you take it from this book, Plaintiff's Exhibit No. 37, this blue folder, Plaintiff's Exhibit No. 24, and give it to him? A. As far as I know there has nothing been taken out of that book. Before I left the employ of the Cudahy Company I might have received for insertion in this instruction book something to supercede Plaintiff's Exhibit No. 24. I don't know what became of these various lists that came with the price list. I did not keep an account of every list that came down. There might have been one that came (327) that superceded that; I don't remember. That list was to go to the jobber as the jobber's price to the retailer; I did not see why I should do anything except distribute these things and have one on file.

Q. I hand you Plaintiff's Exhibit No. 26 and ask you if you recall getting anything of a similar kind, that is, relating to prices and distributing agents, subsequent to this and superceding it? A. Yes, it might possibly have been. This is the jobbers' and perhaps they call them distributors.

Q. What is the date of that? A. January 1, 1910, That was the very day I entered the employ of the company.

Q. And in the three years and nine months that you were with the company, didn't you receive anything to supercede that? A. Yes, I suppose I did.

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Q. Where is it? A. I don't know.

Q. It was in this book, wasn't it? (Indicating Plaintiff's Exhibit No. 37). A. Not necessarily. This was the form of the jobbers' cost, and then there was a form succeeding this called the distributor, if I remember correctly.

Q. Why did you keep the old one, carry the old one around for three years and nine months, and why did you lose or disregard or neglect or leave out the one that superseded it? A. I do not know that I ever gave this list to anybody. I do not know how this list came about; I do not know that I ever gave it to anybody or gave any other list to anybody except the price list that was secured from the regular jobbers' selling price to the retailer. I really do not know that. I there was a list that came after this, what became of it I don't know. I am not interested in the Cudahy Company any (328) more and why should I retain all this stuff? Perhaps if I had all the papers that were in my possession and had been destroyed, and there were a great many of them, then they would have spoken for themselves.

The COURT: Can you not show him a subsequent one, if there is one, and ask him to identify it?

Mr. MONTAGUE: This witness has answered everything but the question asked him, and I ask that it be repeated.

(Question repeated.)

Mr. BAKER: We object to it.

The COURT: I think the simplest way would be to show him the one he has omitted and ask him whether he omitted it.

Q. You have no further answer to give to that question, have you? A. No, sir.

Q. I hand you Defendant's Exhibit P-No. 2, and ask you if that did not, in fact supersede—

Mr. SMITH: What is the date of that? A. April 14, 1913.

Q. —if that did not, in fact, supersede this paper (Plaintiff's Exhibit No. 25), which is dated January 1, 1910? A. These lists did supersede the old list.

Q. Why didn't you give that to Mr. Frey when he asked for it; you had one, hadn't you? A. At the time Frey asked for these lists I gave him a few lists that I had or could find at the time. I was not particularly interested in Frey, interested that he should be equipped with all the data.

Q. Had the sale price of Old Dutch Cleanser to retailers—I mean the price at which jobbers sold it and distributors sold it, and you, as canvasser of the retail trade quoted it, namely, \$3.40,—ever been changed? It has always been \$3.40, hasn't it? A. As near as I can (329) recollect, I never heard of any change.

The WITNESS: (Answering further questions) I might have obeyed all the instructions which were given me by the New York office, and there might have been a few I did not. I have no recollection of that. I don't know that I disobeyed any. And whatever I did in canvassing orders might have been in pursuance of those instructions. I tried to. I testified yesterday that I followed out instructions and that when in March, 1913, I was instructed to cease taking orders to Frey and to send those orders or switch them to some other distributor I did so.

Q. During this short period of time, which was so short that you say Mr. Frey knew nothing of it, you tried to switch orders from Frey to other distributing agents, didn't you? A. If I came across any of Frey's customers; I don't know how many customers I came across that dealt with Frey, but if I did come across any I switched them, yes.

Q. And you tried your best to get the retailer to buy from somebody else? A. Yes.

Q. I hand you a paper and ask you if you have ever seen this before (handing paper to witness, the paper being dated April 9, 1913? A. I don't know that I ever have seen it before. I might have and I might not have; I can't recall.

Q. Do you recall the instructions of the company to this effect: "If you are selling a retailer and he should ask you to book the order through a jobber who is not on your list, you will simply state, I am unable to accept the order for their account, please name another jobber. If the retailer does not wish to name a jobber on our distributing agent's list, you will merely say, I am sorry, but I am unable to accept the order." Do you recall

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any such instructions? A. Possibly I might have mis-constructed—

(330) The Court: I call your attention to the fact that that circular, so far as it bears on this action with reference to Frey, did not reach him until 22 days after Frey had been cut off and presumably after Frey had been put back again.

Mr. MONTAGUE: But that, for a long period of time, has been an oral instruction of the Company.

Q. (By Mr. MONTAGUE) Do you recall ever receiving such an instruction orally to that effect? A. If I can recollect correctly, my oral instructions were to switch the retailer over to another jobber. I don't know whether that instruction was given to me by Cudahy or whether it applied to some other instance, but it was always customary to turn the orders over to some other jobber.

Q. Do you ever recall receiving this instruction from the Cudahy Packing Company: "If you are selling a retailer and he should ask you to book the order through a jobber who is not on your list, you will simply state, I am unable to accept the order for their account, please name another jobber. If the retailer does not wish to name a jobber on our distributing agent's list, you will merely say, I am sorry, but I am unable to accept the order."

The Court: That says if you do not succeed in switching, go without the order, and if you can switch, switch.

Q. Do you recall receiving that instruction?

Mr. BAKER: He said he had an oral instruction but he did not identify the written instruction.

Mr. MONTAGUE: I would like to note an exception to your Honor's characterization, in the presence of the jury, of this paper, which is not in evidence, and which I respectfully submit is to be construed exactly to the contrary of what your Honor has stated.

To the statement of the Court aforesaid, to which exception was noted, the defendant excepted, and now (331) pray the court to sign and seal this its one hun-

dred and sixteenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(332) The COURT: (Speaking immediately after the last statement of Mr. Montague) The construction of written documents is with the Court. I do not think that I erred in my construction; if I did, I will change it. (Examining paper.)

Mr. MONTAGUE: That instruction was precisely to prevent switching, I think, and your Honor inadvertently has given the jury the impression that it means to the contrary.

The COURT: "If you are selling a retailer and he should ask you to book the order through a jobber who is not on your list, you will simply state, I am unable to accept the order for their account, please name another jobber." Now, I hold that to mean that the first suggestion would be that if we can not take an order through that man, give us another name. That certainly would not preclude the missionary from naming the jobbers, or some of the jobbers from whom he could get an order. "If the retailer does not wish to name a jobber on our distributing agent's list"—and that means he must be told who is on the list—

Mr. MONTAGUE: I take exception to that, and also to your Honor's taking out certain sentences instead of taking the whole thing and construing it as if it were one paper. Your Honor is construing it as though the other sentences were not there.

To the statement of the Court aforesaid, to which exception was noted, the defendant excepted, and now prays the court to sign and seal this its one hundred and seventeenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents (333) and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

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The COURT: (Speaking immediately after the last statement of Mr. Montague) The exception of the counsel will be noted. I am not aware in proceeding to construe written documents that the construing authority does not handle the construction in the way that seems most likely to reach a satisfactory conclusion.

Mr. MONTAGUE: I respectfully suggest to your Honor that this has not been put in as a written document, and I am merely asking the witness as to an instruction, whether there was such an instruction, so there is no such written document and it is for this jury to decide.

The COURT: Then I will withdraw my characterization of this, if it is desired, and will let the jury pass upon it—no, I will not do that, because I must construe the written document when it comes in, but I can only say that the jury may think, as I personally do think,—though my personal views are not controlling on the jury, that the jury will probably construe that document in the way I construe it.

Mr. MONTAGUE: I except to that on the ground that there was no document before your Honor to construe. We had a memorandum on the question but this has not been offered in evidence.

(334) The COURT: Then if counsel does not offer it in evidence, so far as I know he had no special right to put any construction on it at all. The whole thing will go out, that is all.

Mr. MONTAGUE: I will not argue it any more, your Honor, I just take an exception to it. I have no further cross examination.

To the statement of the Court aforesaid, to which exception was noted, the defendant excepted, and now prays the court to sign and seal this its one hundred and nineteenth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

RE-DIRECT EXAMINATION.

By Mr. BAKER:

Q. I will ask you whether or not, in any of the con-

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versations you had with any members of the Cudahy Packing Company, any objection was made to Frey & Son's credit?

(Objected to; objection overruled; exception noted.)

(335) To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and twentieth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. None whatever.

Q. Was there, during the time that you represented the Cudahy Packing Company, any change in the plan of selling, so far as you know?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and twenty-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. Except we afterwards called the jobbers distributors.

Mr. MONTAGUE: That calls for a characterization of written documents, your Honor, and that is your Honor's province and not the witness'.

(336) (Objection overruled; exception noted.)

To the overruling of the defendant's objection afore-

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said, to which exception was noted, and permitting the witness to answer the defendant excepted, and now prays the court to sign and seal this its one hundred and twenty second bill of exceptions, which is accordingly done this 20 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, District Judge. (Seal)

Q. I will ask you whether or not you have personal knowledge as to why they changed from wholesalers and jobbers and called them distributing agents?

(Objected to; objection overruled; exception noted.)

A. I don't know of any particular reason. I would not like to state a reason.

Q. Why? A. It would be mere guesswork. I have my own conclusion about it.

RE-CROSS EXAMINATION.

By Mr. BOWIE:

Q. You stated there was no objection to Frey's credit on the part of the Cudahy Company's representatives; was that discussed with you? A. No, sir, I never heard that come up.

Thereupon—

LOUIS W. HAMMEN, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. SMITH:

(337) The WITNESS: I am employed by Frey & Son. I have been employed twelve or thirteen years by the firm of Frey & Son. Up to 1912 I was salesman, and after 1912 I was sales manager of the out of town department; up to the latter part of 1915, that is; then I was made sales manager of the City Department, which I hold at the present time. I succeeded Mr. Swift as manager of the City Department. Mr. Swift died at that time.

Q. During your connection with Frey & Son and with reference to the time after January, 1914, tell us what demands, if any, you had for Old Dutch Cleanser from the retail trade.

Mr. MONTAGUE: This is objected to as not the best evidence.

The COURT: As a matter of fact, in the city trade, (338) when a man comes in and asks for goods he does not give any order, as I understand it. I will overrule the objection.

(Exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and twenty-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. We have had quite a large demand for Old Dutch Cleanser. It was one of the most popular sellers we had. There was no reason why we would not have a large demand for it. I do not know just what the size of the demands were; I don't remember that any more, but we still have demands up to the present date for it.

Mr. MONTAGUE: May I have it understood that my objection on the ground that it is incompetent, irrelevant and immaterial and not the best evidence may be taken and exceptions and not the best evidence may be taken. (339) **The COURT:** Yes. Did you have calls for it, and if so, how much? And do you remember whom you had the calls from?

The WITNESS: As I was coming out to the court from the office there was a gentleman stepped up to me and asked me could I—

Mr. MONTAGUE: I object, your Honor, to any transactions which have occurred since the commencement of this action.

LOUIS W. HAMMEN.

The Court: That is a question which I will rule upon at the end of the case, as I have said. We will take this subject to the general exception that I will rule on it at the end of the case. I may say to counsel that I am inclined to think that I will sustain the objection there, after an examination of that Supreme Court case. It seems to me that the rule there laid down is this, that for any damage resulting from the thing that was done before the suit was begun, as, for example, if a man is injured in a railroad accident, he may recover damages for all the injuries that he has suffered, though some of that damage only manifests itself in a pecuniary way since the suit was brought, but that he can not recover damage for such damages as result from, not the original act, not the things that were done before the institution of the suit, but already originating out of the day by day or week by week continuance of something that had been begun before the suit, but which at any time after the suit might have been suspended, although in (340) point of fact the same practice was followed.

The Witness: As I was leaving the office, one of our customers stepped up to me and asked me whether I had a price on Old Dutch Cleanser, and I said, What do you mean by a price? And he said, Can you sell me Old Dutch Cleanser at a cut price? And I told him No. He is not less than a five box buyer; I didn't ask him how many he wanted but he is a pretty good buyer. So that is as far as that went. But as for just how many calls I have had for Old Dutch Cleanser or just when and all that sort of thing, it is impossible for me to remember.

Q. Could you say as to whether they are considerable or not, beginning January 1, 1914, and ending in May, 1915, just after you were cut off?

(Objected to; objection overruled; exception noted.)

To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and twenty-fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

A. Yes.

MR. MONTAGUE: I now move to strike out the testimony of the witness on the grounds heretofore stated.

(Objection overruled; exception noted.)

(341) To the overruling of the defendant's objection aforesaid, to which exception was noted, and permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and twenty-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(Cross examination waived, testimony of witness concluded.)

Thereupon—

LOUIS G. BERTRAM, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. BAKER:

THE WITNESS: My occupation is bookkeeper for Frey & Son. I have been with Frey & Son about eight years this coming June. I have been bookkeeper three months. Prior to that time I was city salesman. I was outside city salesman for three years, up until the latter part of February, when I became bookkeeper. When Frey & Son were cut off from getting Old Dutch Cleanser and a couple of years thereafter, I was inside salesman. As inside salesman's, my duties were waiting on people that came into the store, taking their orders. As outside city salesman my duties were following up missionary orders and taking orders at the same time. Taking the time from February, 1914, down to May, 1915. I had lots of requests from customers for Old Dutch Cleanser;

FRANK T. REITER.

I did not take any orders. By lots of requests, I mean on an average of about ten or fifteen a week.

(342) Mr. MONTAGUE: I would like to note the same objection that I did to the same line of examination of Mr. Hammond's testimony.

The COURT: Very well.

Q. Was the request in any particular case less or not? A. Not particularly.

Q. Taking it from May, 1915, down to the present time—

The COURT: I will take this subject to exception so far as the time goes.

(343) A. Not as much as the first, because the people got on to it that we did not have it.

CROSS EXAMINATION.

By Mr. BOWIE:

The WITNESS: (Answering questions): As outside city salesman I got orders from the retailers.

Q. Can you give us an approximation of the orders that you got for Old Dutch Cleanser that you could not fill? A. No, sir, that would be impossible. I can not say definitely how many there were a week. The majority of them were for a case. We sold in less than case lots, in two-dozen and one-dozen; but I have no idea as to how many cases that would make.

RE-DIRECT EXAMINATION.

By Mr. BAKER:

The WITNESS: (Answering questions): I did not write down any order for Old Dutch Cleanser when I did not have it in stock, unless it might have been right at the beginning. It was a little while before I knew that we were cut off and I wrote it down by simply marking, short. When I received an order for Old Dutch Cleanser after we were cut off, I just let it drop, marked it off and that ended it.

Thereupon—

FRANK T. REITER, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. SMITH:

THE WITNESS: (Answering questions): My business is wholesale grocer. I have been in that business about eight years. My place of business is in Baltimore. I am secretary of Andrew Reiter & Company, a corporation. Andrew Reiter and Company have handled Old Dutch Cleanser, ever since I can remember. That would be eight years up to the present time. Andrew Reiter & Company pays for Old Dutch Cleanser three dollars, (344) less a quantity allowance of five cents the case, in two hundred and fifty case lots, and two per cent discount for cash in ten days. We sell the Old Dutch Cleanser throughout the City and a large part of Maryland. We sell a little out of the State and have done so during that eight years. Depending upon the quantity, we sell it at the price of \$3.40 single case lots; \$3.30 for five case lots; \$3.25 for ten case lots and \$3.20 for 25-case lots less, of course the discount of two per cent for cash. You ask, where do we get that price? We take that price from Cudahy's price list as he sends them to us. So far as I know what I have said has been true of the entire eight years; it has always been the same. To fill the orders we have always gotten the Old Dutch Cleanser hauled from the warehouse here. Whether or not they used to make shipments from New York I am unable to say. I would not have followed that up. The Dutch Cleanser comes to the warehouse here. I suppose from New York. I don't know whether it is manufactured in Chicago or not; I suppose it is. I would suppose it comes to the warehouse here from outside of the State of Maryland. I have seen these general sales lists, the circulars that have been offered in evidence. I have seen the circulars headed, "The Price to the Retailers." Our Company has received those circulars, I think, regularly, yes. In selling the Old Dutch Cleanser which we had bought, we adhered to the prices stated in those lists with a few exceptions. Whether those few instances in which we cut the price were done with the knowledge of the Cudahy Packing Company I don't know. I have an idea that they found it out.

Q. You do not think, in other words, that it was with their knowledge? A. I have an idea they found it out.

FRANK T. REITER.

Q. Afterwards, you mean? A. Yes, after the cut.
(245) Q. Was any complaint made to you about it? A. Around that time I had one of their salesmen approach me and state definitely what their policy had always been. That was as far as it got. Had I known that policy at the time I would not have cut Old Dutch Cleanser. You ask me what policy did he state? He said, "We always in the past have gone along certain lines with our selling end of it and of course we know that certain parties in the city here have been getting Dutch Cleanser, we will not say who they are, but we have definite data as to who they are. The cases are numbered and we know who gets the stuff. We will not say who they are, but we know it is being done. Now I just want to present our policy so that you will be fully informed on that, and of course I would not want you to be one of those whom we suspicion of cutting." He said nothing about what the consequences would be if we did not take that advice. After that, we pretty much observed the advice. Personally I would not want to say, because I think that several of our salesmen are rebating on Dutch Cleanser. I have never seen myself a definite case of that but I have heard them speak of it. That conversation I have related was with Mr. Conway. What year it was I wouldn't want to say. I think it was after Frey & Son were cut off of Dutch Cleanser. I don't recall whether it has been two years ago or not, but I imagine it has been that long ago.

CROSS EXAMINATION.

By Mr. MONTAGUE:

The WITNESS: (Answering question): I don't know whether I received this particular issue of the "General Sales list" but I received these quite often. I wouldn't want to say that I am sure I have received one like that, but I do receive them very much like this. I have received some probably within the last month. I think it bears the same general resemblance. As to the inside I would not want to say. I think I have seen them very similar to this paper called "Distributing Agents Compensation", and very often. My recollection is fairly distinct as to having received something substantially like these *two* many times, so that I can say that I can say that I have seen them.

FRANK T. REITER.

Mr. MONTAGUE: I am going to offer them in evidence. The COURT: I think the proper way would be to prove that by some of your own witnesses. This witness does not exactly identify them.

Q. I suppose the state of your recollection as to all previous ones is about as it is to these last? A. That last one there, the selling list, looks a trifle different from what I have seen, that is the inside of it, that White Flag Soap and so forth, looks a little different.

The WITNESS: (Answering further questions): I have never seen this one at all (indicating Plaintiff's Exhibit No. 26). That must be very old. I would not remember this far back. I don't recall ever having seen one in the same type as this (indicating to Plaintiff's Exhibit No. 24), or this one either (referring to Plaintiff's Exhibit No. 25). These all seem to be pretty much the same type. Those that I have been used to seeing and at a time when I have been really interested, which possibly was within five years of the present time, I have had experience with these for eight years and of course in the early part of my experience I was apart from the buying of Old Dutch Cleanser and had no interest in it, and those lists are a little beyond the time I was interested. That also refers to the last paper, Plaintiff's Exhibit No. 26. I have heard the phrase used, "General Distributing Agents" in connection with Old Dutch Cleanser. I am a general distributing agent.

Q. Has anybody connected with the Cudahy Company so described you, as a general distributing agent, in conversation with you? A. I don't know that they have, but they have never given me to think otherwise.

(347) The WITNESS: (Answering further questions): I certainly regard myself as absolutely free to sell that Old Dutch Cleanser at any price I choose.

Q. Have you conducted your business throughout on the basis that you could sell that at any price you should choose? A. We have not. We need a suitable profit and we take it.

Q. Do you regard the difference between the price at which you buy, as you have testified, and the price at which you sell, as a suitable profit?

(Objected to; objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and twenty-ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. Is the reason why you sell at the price of \$3.40 because you want to get the profit?

(Objected to; objection overruled; exception noted.)

A. That is one of the reasons.

Q. Is the reason why you do not sell at a less price than that because you want the full profit?

(Objected to; objection overruled; exception noted.)

A. That is one of the reasons. Do you want the other reason?

The COURT: Yes.

Mr. MONTAGUE: Yes, give me the whole thing.

A. The other reason is that I feel that Cudahy & Company would not publish a price list maintaining or requesting us to maintain a price unless they felt it was (348) good for the policy of their concern and for everybody concerned, and for the reason I observe that for the good of my fellow jobbers.

Q. In so doing you also feel that it is good for you as well as for them? A. Yes.

Q. Were there any other cleansers on the market during the period from say 1912 up to the present time?

Mr. BAKER: We object to that as not proper cross examination.

(Objection sustained; exception noted.)

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and permitting the witness not to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and thirtieth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge (Seal)

THE WITNESS: There has never been any contract entered into between us and the Cudahy Packing Company as to the price at which we should sell Old Dutch Cleanser nor any agreement of any kind at all as to price, any agreement by which we obligated ourselves that we would sell at a certain price.

THE COURT: Did you feel yourself, after your conversation with the agent, in honor free to cut the price?

THE WITNESS: Not honor free, no, sir.

Q. What do you mean by that? **A.** I mean that I practically assured him that it was beyond my knowledge that they had any such policy and that if I had known it I would have been only too glad to have cooperated (349) with them as I have done with all manufacturers, and that I would see that with my knowledge it would not be done. Because I considered it fair to ourselves and to the Cudahy Company and distributing agents everywhere to sell at the price, that is why we sold it at that price. That states the whole of our understanding.

RE-DIRECT EXAMINATION.

By Mr. SMITH:

Q. Then you did agree with the representative of the Cudahy Packing Company who called to see you at the time mentioned not to cut the price in selling Old Dutch Cleanser? **A.** Only verbally. I knew that it was the wish of the Cudahy Packing Company that the jobbers should not sell at less than that price which had been fixed by the Cudahy Packing Company. I adhered to it. I could not tell whether the other jobbers around Baltimore did the same thing. I don't know among the grocery trade what my competitors are doing. I mentioned

STEWART R. WILLCOX.

the word "distributing agent" and the word "Jobber", but I do not know up to what time the Cudahy Company used the term "jobber" in connection with this plan.

The COURT: What changed occurred in your relations with the Cudahy Packing Company, or your method of doing business after they ceased calling you jobber and called you distributing agent?

The WITNESS: So far as I know, none.

Thereupon—

STEWART R. WILLCOX, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BAKER:

The WITNESS: (Answering questions): My occupation at the present time is out of town sales manager for Frey & Son. I have been such since the fall of 1915. (350) Prior to that time my occupation was bookkeeper for the same concern. I was bookkeeper since the fall of 1912, three years. I remember when Frey & Son were cut off from Old Dutch Cleanser. Taking that time down to May, 1915, we received numerous orders for Old Dutch Cleanser. We received them by the mails. We have those letters ordering them in our files, that is some of them. We keep our letters about four years. We have letters that we could bring here from our files within four years.

Q. Will you see if you can find those letters? A. Do you mean orders, each order containing one case of Old Dutch Cleanser, or something like that?

The COURT: Orders for one or more cases.

The WITNESS: Some of them have been destroyed after three years.

Q. But do you know when they do destroy them, within what time? A. About three years, I believe.

The COURT: There ought to be some here for the period covered.

The WITNESS: Whether I can locate them or not I can not say.

Mr. BAKER: Then I will excuse you until you find out. Between 1912 and 1915.

The COURT: A time from 1912 to May, 1915.

Mr. MONTAGUE: I think in view of our demand that it might be well to take within five years previous to May, 1915.

The COURT: Yes, but under his testimony it is not likely that he will find them that far back.

(Examination of witness temporarily suspended.)

Thereupon—

GEORGE E. OWEN, a witness of lawful age, produced on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. BAKER:

(351) The WITNESS: (Being questioned): My occupation is missionary salesman for Cudahy Packing Company. I am located in Baltimore at the present time. I have been located in Baltimore since September last year. I have been employed by the Cudahy Packing Company since 1910 or 1911. Old Dutch Cleanser is manufactured in Calumet, Indiana. I do not know how it is brought to Baltimore. At times there is some stored in Baltimore, I believe.

The COURT: If there is any particular importance in this testimony for this case, there are plenty of affidavits in this case at an earlier stage that will fix all that and I shall insist upon your agreeing about that. All that method of doing business was gone into in the case before, where the stuff came from and all that has been gone into fully in the other case and is available to you and I should say by agreement that you can put in what part of that is necessary.

Mr. BOWIE: There is no dispute about it, so far as I know.

Thereupon—

LAURENCE SONNEHILL.

LAURENCE SONNEHILL, a witness heretofore sworn, and whose examination was temporarily suspended, resumed the stand and testified as follows:

RE-CROSS EXAMINATION.

By Mr. MONTAGUE:

(It was stated by Mr. Montague that for the purpose of the following examination the witness is adopted as his witness.)

The WITNESS: The name "Sonnehill" on the package of papers you hand me is my signature. These are orders which I obtained from retailers and turned over to Frey & Son. The signature at the bottom "Frey & Son" is the signature put on both in stamp and pencil. (352) Mr. MONTAGUE: I offer this bundle of papers in evidence.

Mr. BAKER: We object on the ground that there is no evidence offered as yet that Frey & Son filled the orders.

The COURT: I think that goes to the weight of the testimony rather than to its admissibility. I will admit the testimony.

(Exception noted.)

(Papers referred to, having been offered in evidence, were marked "Defendant's Exhibit Q.")

DEFENDANT'S EXHIBIT "Q."

NOTE: Following is a sample of the form of the order and a tabulation showing the dates, number of boxes and the price per box shown by the orders:

Salesman L. Sonnehill

Date 8 27 12.

SHIP to Bowes & Dell,	
Town Cathedral & Biddle	State
To be billed by Jobber	Frey & Son,
Town Belto.	State Md.
Terms: Regular	Reg.
Date of Shipment	Sept. 5th.

No. of Boxes	No conditions in this contract except as herein specified.	Price Per Box.
5	Old Dutch Cleanser (48 10c Cans) FROM STOCK	3.30.

CUDAHY'S COPY.

Jobber will please sign and date this copy and **INDICATE MODE OF SHIPMENT** in space provided and then mail this copy to The Cudahy Packing Co., South Omaha, Neb. or proper Division office.

All orders subject to confirmation and unless otherwise specified are for prompt shipment, delivered F. O. B. point of shipment.

Signature of Purchaser. **BOWES & DELL.**

TO JOBBER PLEASE ERASE whichever shipping option is not to apply on this order.

SHIP from factory.....**OR**.....We will ship from
(353) our own (Jobbers) stock.

JOBBER'S SIGNATURE.....

Date,

Date.	Number of Boxes.	Price per Box.
Nov. 23, 1912,	25	\$3.00
Dec. 8, "	25	3.20
Apr. 12, "	25	3.20
May 12, "	25	3.20
" 31, "	25	3.20
July 26, "	25	3.20
Aug. 13, 1912,	5	3.30
" 23, "	5	3.30
July 10, "	5	3.30
" 11, "	5	3.30
" 9, "	5	3.30
" 22, "	5	3.30
" 2, "	5	3.30
" 19, "	5	3.30
" 29, "	5	3.30

Date.		Number of Boxes.	Price per Box.
"	12, "	5	3.30
"	18, "	5	3.30
June	6, "	5	3.30
"	10, "	5	3.30
"	28, "	5	3.30
"	17, "	5	3.30
"	5, "	5	3.30
"	26, "	5	3.30
"	4, "	5	3.30
"	27, "	5	3.30
"	21, "	5	3.30
May	13, "	5	3.30
"	16, "	5	3.30
"	15, "	5	3.30
"	31, "	5	3.30
"	10, "	5	3.30
"	14, "	5	3.30
"	22, "	5	3.30
"	30, "	5	3.30
"	17, "	5	3.30
"	24, "	5	3.30
Apr.	11, "	5	3.30
"	26, "	5	3.30
"	19, "	5	3.30
"	22, "	5	3.30
"	25, "	5	3.30
Jan.	11, "	10	3.25
"	9, "	5	3.30
Aug.	22, 1913,	5	3.30
"	21, "	5	3.30
"	19, "	5	3.30
"	15, "	5	3.30
"	14, "	5	3.30
"	12, "	5	3.30
"	7, "	5	3.30
"	4, "	5	3.30
"	3, "	5	3.30
July	28, "	5	3.30
"	21, "	5	3.30
"	18, "	5	3.30
"	17, "	5	3.30
"	7, "	5	3.30
"	1, "	5	3.30

Date.	Number of Boxes.	Price per Box.
June 27, "	5	3.30
" 26, "	5	3.30
(354)		
June 24, 1913,	5	3.30
" 19, "	5	3.30
" 18, "	5	3.30
" 17, "	5	3.30
May 29, "	5	3.30
" 28, "	5	3.30
" 27, "	5	3.30
" 23, "	5	3.30
" 22, "	5	3.30
" 16, "	5	3.30
" 13, "	5	3.30
" 9, "	5	3.30
" 7, "	5	3.30
Apr. 30, "	5	3.30
" 23, "	5	3.30
" 21, "	5	3.30
" 17, "	5	3.30
" 18, "	5	3.30
" 15, "	5	3.30
" 9, "	5	3.30
" 11, "	5	3.30
" 10, "	5	3.30
" 8, "	5	3.30
" 6, "	5	3.30
" 2, "	5	3.30
" 1, "	5	3.30
Mch. 7, "	5	3.30
" 6, "	5	3.30
" 3, "	5	3.30
Feb. 24, "	5	3.30
" 21, 1912,	5	3.30
" 18, 1913,	5	3.30
" 11, "	5	3.30
" 10, "	5	3.30
" 3, "	5	3.30
Jan. 31, "	5	3.30
" 20, "	5	3.30
" 16, "	5	3.30
" 14, "	5	3.30
" 13, "	5	3.30

LAURENCE SONNEHILL.

Date.	Number of Boxes.	Price per Box.
" 17, "	5	3.30
" 10, "	5	3.30
" 8, "	5	3.30
Dec. 17, 1912,	5	3.30
" 5, "	5	3.30
" 24, "	5	3.30
" 20, "	5	3.30
" 16, "	5	3.30
" 31, "	5	3.30
" 30, "	5	3.30
" 6, "	5	3.30
" 27, "	5	3.30
Nov. 29, "	5	3.30
" 1, "	5	3.30
" 27, "	5	3.30
" 5, "	5	3.30
" 8, "	5	3.30
" 21, "	5	3.30
" 6, "	5	3.30
" 15, "	5	3.30
" 12, "	5	3.30
" 16, "	5	3.30
Oct. 24, "	5	3.30
" 14, "	5	3.30
" 31, "	5	3.30
" 2, "	5	3.30
(355)		
Oct. 23, 1912,	5	3.30
" 4, "	5	3.30
" 26, "	5	3.30
" 11, "	5	3.30
Sept. 12, "	5	3.30
" 13, "	5	3.30
" 5, "	5	3.30
" 23, "	5	3.30
" 24, "	5	3.30
Aug. 14, "	5	3.30
" 21, "	5	3.30
" 8, "	5	3.30
" 19, "	5	3.30
" 16, "	5	3.30
" 26, "	5	3.30
" 30, "	5	3.30
" 2, "	5	3.30

Q. I hand you another bundle of papers and ask you as to whether those are some orders which you solicited and which you turned over to Frey and which bear Frey's signature, the signature of Frey & Son at the bottom? A. Some of those orders bear perhaps Mr. Hammond's signature, but it was signed by somebody down there in authority.

MR. MONTAGUE: I offer these in evidence.

(Paper referred to, having been offered in evidence, was marked "Defendant's Exhibit R.")

NOTE: The form of the order is the same as Defendant's Exhibit "Q". Following is a tabulation showing the dates, number of boxes and price per box shown by the orders:

Date.	Number of Boxes.	Price per Box.
Feb. 24, 1913,	1	3.40
" 28, "	1	3.40
" 21, "	1	3.40
" 17, "	1	3.40
" 17, "	1	3.40
" 13, "	1	3.40
" 12, "	1	3.40
" " "	1	3.40
" 11, "	1	3.40
" 10, "	1	3.40
" 6, "	1	3.40
" 5, "	1	3.40
" 4, "	1	3.40
" 3, "	1	3.40
" " "	1	3.40
" " "	1	3.40

(356) Q. I now hand you another bundle of papers and ask you if those are orders which you solicited from retailers and which you turned over to Frey & Son and which bear the signature "Frey & Son" or some one in his behalf? A. Yes.

MR. MONTAGUE: I offer those papers in evidence.

LAURENCE SONNEHILL.

(Papers referred to, having been offered in evidence, were marked "Defendant's Exhibit S.")

NOTE: The form of the order is the same as Defendant's Exhibit "Q". Following is a tabulation showing the dates, number of boxes and price per box shown by the orders:

Date.		Number of Boxes.	Price per Box.
May	13, 1912.	1	3.40
"	9, "	1	3.40
"	21, "	1	3.40
"	23, "	1	3.40
"	24, "	1	3.40
"	29, "	1	3.40
"	30, "	1	3.40
June	3, "	1	3.40
"	4, "	1	3.40
"	5, "	1	3.40
"	17, "	1	3.40
"	20, "	1	3.40
"	24, "	1	3.40
"	26, "	1	3.40
July	10, "	1	3.40
"	11, "	1	3.40
"	" "	1	3.40
"	16, "	1	3.40
"	25, "	1	3.40
Aug.	1, "	1	3.40
"	12, "	1	3.40
"	13, "	1	3.40
"	20, "	1	3.40
"	22, "	1	3.40
"	26, "	1	3.40
"	" "	1	3.40
"	29, "	1	3.40
May	20, "	1	3.40
Dec.	5, "	1	3.40
Nov.	26, "	1	3.40
"	18, "	1	3.40
"	17, "	1	3.40
Oct.	25, "	1	3.40
"	23, "	1	3.40
"	15, "	1	3.40
"	" "	1	3.40

Date.	Number of Boxes.	Price per Box.
" 17, "	1	3.40
" 9, "	1	3.40
" 1, "	1	3.40
Sept. 23, "	1	3.40
" 11, "	1	3.40
Apr. 17, "	1	3.40
" 29, "	1	3.40
" 4, 1913,	1	3.40
" 8, "	1	3.40
(357)		
Apr. 4, 1913,	1	3.40
" 16, "	1	3.40
" 17, "	1	3.40
" " "	1	3.40
" 23, "	1	3.40
" 22, "	1	3.40
" " "	1	3.40
" 21, "	1	3.40
" 29, "	1	3.40

Q. I now hand you five bundles of paper and ask you if these are also orders which you solicited from the retailers and which you turned in to Frey & Son, and which bear the signature of Frey & Son, or some one in their behalf? A. Yes, that is Dutch Hand Soap and Dutch Cleanser, single cases.

Mr. MONTAGUE: I offer those papers in evidence.

(Papers referred to, having been offered in evidence, were marked "Defendant's Exhibit 'T'.")

NOTE: The form of the order is the same as Defendant's Exhibit "Q". Following is a tabulation showing the dates, number of boxes and price per box shown by the orders:

Date.	Number of Boxes.	Price per Box.
Mch. 31, 1913,	1	3.40
" 2, "	1	3.40
" 3, "	1	3.40
" 4, "	1	3.40
" 6, "	1	3.40

LAURENCE SONNEHILL.

Date.	Number of Boxes.	Price per Box.
" 7, "	1	3.40
" 10, "	1	3.40
" " "	1	3.40
" 11, "	1	3.40
" " "	1	3.40
" 13, "	1	3.40
" 26, "	1	3.40
" 27, "	1	3.40
July 2, "	1	3.40
" 1, "	1	3.40
" 2, "	1	3.40
" 10, "	1	3.40
" 11, "	1	3.40
" 9, "	1	3.40
" 8, "	1	3.40
" 7, "	1	3.40
" " "	1	3.40
" 14, "	1	3.40
" 15, "	1	3.40
" 16, "	1	3.40
(358)		
May 8, 1913,	1	3.40
" " "	1	3.40
" 5, "	1	3.40
" 14, "	1	3.40
" 16, "	1	3.40
" 13, "	1	3.40
" 12, "	1	3.40
" " "	1	3.40
" 22, "	1	3.40
" 23, "	1	3.40
" 27, "	1	3.40
" " "	1	3.40
" 29, "	1	3.40
" 27, "	1	3.40
June 4, "	1	3.40
" 2, "	1	3.40
" 12, "	1	3.40
" 4, "	1	3.40
" 10, "	1	3.40
" 9, "	1	3.40
" 11, "	1	3.40
" 5, "	1	3.40
" 6, "	1	3.40

Date.	Number of Boxes.	Price per Box.
" 2, "	1	3.40
" " "	1	3.40
" " "	1	3.40
" 3, "	1	3.40
" 16, "	1	3.40
" 18, "	1	3.40
" 19, "	1	3.40
" 26, "	1	3.40
" 25, "	1	3.40
" 23, "	1	3.40
Aug. 7, "	1	3.40
" 25, "	1	3.40
" 26, "	1	3.40
" 27, "	1	3.40
" 28, "	1	3.40
" 29, "	1	3.40
" " "	1	3.40

Q. I now hand you these papers, which I will not put into a bundle and ask you if you can tell me what these are; these, I believe, were separated by you? A. Yes, these are all single cases either of Dutch Cleanser, Lilac Rose or Dutch Hand Soap.

Q. Were those orders which you solicited and which you turned in to Frey & Son? A. They were.

Q. And are they orders which bear the signature either of Frey & Son, or some one in their behalf? A. Yes.

Mr. MONTAGUE: I will limit my offer merely to the Old Dutch Cleanser and not to the other articles. I offer (359) them in evidence.

(Papers referred to, having been offered in evidence, were marked "Defendant's Exhibit U.")

NOTE: The form of the order is the same as Defendant's Exhibit "Q". Following is a tabulation showing the dates, number of boxes and price per box shown by the orders:

Date.	Number of Boxes.	Price per Box.
June 12, 1912,	1	3.40
Oct. 29, "	1	3.40
" 22, "	1	3.40

LAURENCE SONNEHILL.

Date.	Number of Boxes.	Price per Box.
Sept. 24, "	1	3.40
" 18, "	1	3.40
" 17, "	1	3.40
Apr. 10, "	1	3.40
" 11, "	1	3.40
" 25, "	1	3.40
May 7, "	1	3.40
" 10, "	1	3.40
" 21, "	1	3.40
" 29, "	1	3.40
" 31, "	2	3.40
June 7, "	1	3.40
" 29, "	1	3.40
" 28, "	1	3.40
July 21, "	1	3.40
" 17, "	1	3.40
Aug. 6, "	1	3.40
" 14, "	1	3.40
Dec. 23, "	1	3.40
" 17, "	1	3.40
" 6, "	1	3.40
Oct. 18, "	1	3.40
Dec. 18, "	1	3.40
Oct. 14, "	1	3.40
" 16, "	1	3.40
Dec. 18, "	1	3.40
" 17, "	1	3.40
Nov. 14, "	1	3.40
" " "	1	3.40
Oct. 28, "	1	3.40
" 23, "	1	3.40
Sept. 4, "	1	3.40
" " "	1	3.40
" 10, "	1	3.40
May 23, "	1	3.40
" 29, "	1	3.40
" " "	1	3.40
" 30, "	1	3.40
June 3, "	1	3.40
" 5, "	1	3.40
" 25, "	1	3.40
" " "	1	3.40
July 17, "	1	3.40
" 29, "	1	3.40

Date.	Number of Boxes.	Price per Box.
Aug. 28, "	1	3.40
Sept. 17, "	1	3.40
Apr. 24, "	1	3.40
Nov. 22, "	1	3.40
May 30, "	1	3.40
" 23, "	1	3.40
Aug. 1, "	1	3.40
June 11, "	1	3.40
(360)		
Dec. 2, 1912,	1	3.40
Nov. 11, "	1	3.40
Sept. 17, "	1	3.40
" 10, "	1	3.40
" 9, "	1	3.40
Apr. 11, "	1	3.40
" 12, "	1	3.40
" 25, "	1	3.40
May 8, "	1	3.40
" 10, "	1	3.40
June 17, "	1	3.40
July 16, "	1	3.40
Aug. 19, "	1	3.40
Jan. 6, "	1	3.40
" " "	1	3.40
" 8, "	1	3.40
" 9, "	1	3.40
" 10, "	1	3.40
" 2, "	1	3.40
Dec. 30, "	1	3.40
" " "	1	3.40
Jan. 16, 1913,	1	3.40
" 20, "	1	3.40
" " "	1	3.40
" 22, "	1	3.40
" " 1912,	1	3.40
" " 1913,	1	3.40
" 23, "	1	3.40
" 24, "	5	3.30
" 27, "	1	3.40
" " "	1	3.40
" " "	1	3.40
" " "	1	3.40
Aug. 2, 1912,	1	3.40
June 4, "	1	3.40

LAURENCE SONNEHILL.

Date.	Number of Boxes.	Price per Box.
May 28, "	1	3.40
" 24, "	1	3.40
" 22, "	1	3.40
" 8, "	1	3.40
" 1, "	1	3.40
Sept. 5, "	1	3.40
" 17, "	1	3.40
" 24, "	1	3.40
Oct. 7, "	1	3.40
" 31, "	1	3.40
May 23, "	1	3.40
Aug. 13, "	1	3.40
" 8, "	1	3.40
July 19, "	1	3.40
June 13, "	1	3.40
May 21, "	1	3.40
May 7, "	1	3.40
" 6, "	1	3.40
Apr. 26, "	1	3.40
" 18, "	5	3.30
Sept. 30, "	1	3.40
Nov. 5, "	1	3.40
" 12, "	1	3.40
" 21, "	1	3.40
" 18, "	1	3.40
Oct. 14, "	1	3.40
" 17, "	1	3.40
Sept. 16, "	1	3.40
" " "	1	3.40
" 10, "	1	3.40
May 9, 1910,	1	3.40
(361)		
May 15, 1912,	1	3.40
" 21, "	1	3.40
June 24, "	1	3.40
Aug. 20, "	1	3.40
" 28, "	1	3.40
July 11, "	1	3.40
June 5, "	1	3.40
May 30, "	1	3.40
" 6, "	1	3.40
Oct. 23, "	1	3.40
Dec. 3, "	1	3.40
" 13, "	1	3.40

LAURENCE SONNEHILL.

Date.	Number of Boxes.	Price per Box.
Oct. 16, "	1	3.40
Sept. 12, "	1	3.40
Apr. 18, "	1	3.40
May 7, "	1	3.40
June 14, "	1	3.40
Apr. 15, "	1	3.40
May 6, "	1	3.40
June 3, "	1	3.40
July 15, "	1	3.40
June 17, "	1	3.40
Nov. 25, "	1	3.40
" 6, "	1	3.40
" 6, "	1	3.40
Aug. 16, "	1	3.40
" 8, "	1	3.40
May 10, "	1	3.40
Apr. 30, "	1	3.40
Sept. 4, "	1	3.40
Nov. 1, "	1	3.40
Dec. 20, "	1	3.40
May 29, "	1	3.40
Dec. 11, "	1	3.40
Nov. 1, "	1	3.40
Oct. 25, "	1	3.40
Oct. 1, "	1	3.40
" 3, "	1	3.40
May 8, "	1	3.40
" 20, "	1	3.40
July 25, "	1	3.40
Aug. 27, "	1	3.40
" 21, "	1	3.40
May 29, "	1	3.40
June 11, "	1	3.40

The WITNESS: (Answering further questions): The significance of the signature of Frey & Son on all these orders which have been admitted in evidence is, perhaps, that the credit was good and they were to be filled by Frey & Son. They were accepted by Frey & Son. I never followed up all those orders and I don't know whether they were filled or not. I do not know whether Mr. Frey filled them or not. It is possible that he could not have filled them. It might possibly have been that he told me of instances where customers had neglected to

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take the goods, and there might have been instances (362) where I wanted to find out that the orders had not been filled and it might have been possible that I returned to Frey and said that the man would take them, or something might have happened, I can not speak of any one individual case. But there was some work done on that line.

Q. Of the orders which you turned in to Frey during the period when you were canvassing the retail trade here, is it your recollection that as many as fifty per cent of them were the subject of these complaints by Frey that there had been rejections by the retailers.

(Objected to.)

The COURT: What he really said was that fifty per cent of all the orders that he got from the missionary work; he did not know that the Dutch Cleanser differed from the others.

Mr. MONTAGUE: Now, I am trying to ask of all orders that he solicited and turned in to Frey and ask him if there was objection as to fifty per cent of them?

Mr. BAKER: There is no evidence that Mr. Frey made any complaint about any of them and therefore it does not contradict Mr. Frey in any way.

The COURT: Was there any considerable number of statements or complaints by Mr. Frey to you about the fact that these orders were not filled?

The WITNESS: I don't remember. I am sorry I am unable to talk intelligently about that, but I know it is our duty to follow up to see that all these orders are filled. I don't know that Mr. Frey put any special stress on that score.

RE-DIRECT EXAMINATION.

By Mr. BAKER:

Q. These orders that are stamped here are the ones that Frey accepted, is that correct? A. It is customary (363) for him to accept them all except if he absolutely knows they are no good for credit reasons, and then we have a right to ask him and he will give the orders back that are not taken out. I may get a batch of those orders handed back to me with four or five different manufacturers in it, and all bunched together, and I may get all

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my orders and I may not. Somebody may come along and take one of my orders off by mistake, and I would never see it, and vice versa.

Q. Were these orders the ones that were handed back to you, or the ones that were, billed? A. I can't say that; I have no recollection of any of those orders being filled. I suppose they were.

Q. When you take an order to Frey & Company, how many copies would you give him? A. He gets a copy and he signs it and stamps it and that is turned in to the company.

Q. Suppose he had stamped a copy when you were there with a missionary order and afterward found out that the man was not responsible? A. He might put it on the file and he might throw it into the waste basket. There is no way of judging that.

Q. These orders, although they bear his name, if upon inquiry he found out for credit reasons—

The COURT: That has been all gone into, don't let's go into that again.

TESTIMONY ON BEHALF OF THE DEFENDANT.

Mr. BAKER: Now, your Honor, with the exception of the young man who went to the office to get the information, I think that is our case.

Testimony on Behalf of the Defendant. Blk Cps.

(364) Mr. BOWIE: We offer this paper in evidence.

(Paper referred to, having been offered in evidence, was marked "Defendant's Exhibit V", and is as follows:

VS. FREY & SON, LEFT IN ERROR.
LAURENCE SONNEHILL.

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DEFENDANT'S EXHIBIT "V."



D. D. C. 210

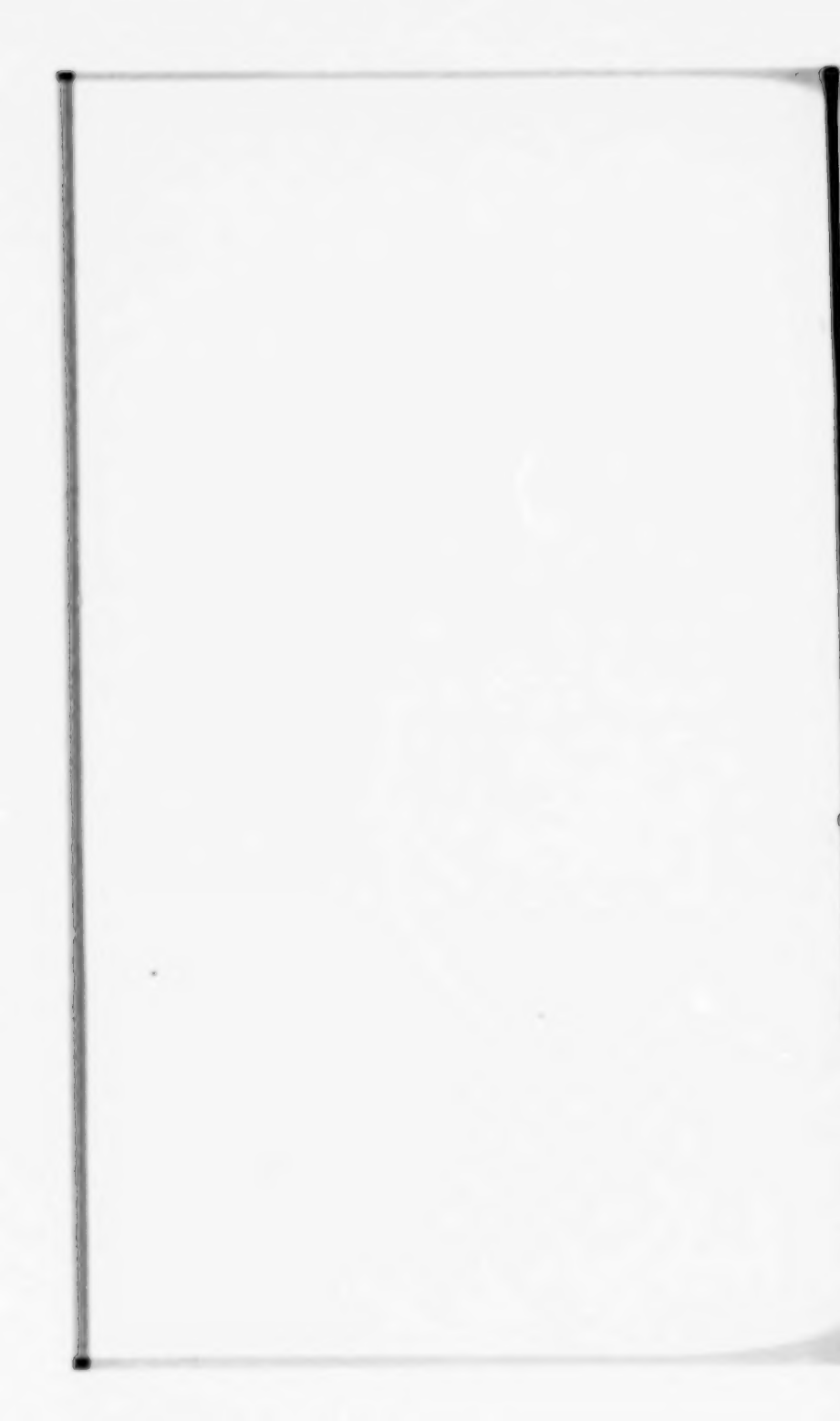
**Distributing Agents'
Compensation**

**in the
United States
for**

**Old Dutch
Cleanser**

**and
Other Products
Listed Herein.**

**THE CUDAHY PACKING CO.
U. S. A.**



STUART EDGETON.

(266) **THE COURT**—STUART EDGETON, a witness of lawful age, produced on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By MR. MONTAGUE:

THE WITNESS: My business is Edgeton Brothers, wholesale grocers. We succeeded W. M. Powell & Company in 1901. Our place of business is in Baltimore city. We have been selling Old Dutch Cleanser ever since they have had it on this market. We were selling it along in 1914 and 1915 and have been selling it since. Before coming up here, after receiving your summons, my brother and myself searched our office for a price list of Old Dutch Cleanser, and we could not find any. Ordinarily on my desk, and also on my brother's desk, I have a number of price lists of goods, similar to Dutch Cleanser that are sold in a similar way, and I could not find one of those lists. No doubt we have gotten them and no doubt we have had them there. Our search did not reveal anything like Defendant's Exhibit V (handing paper to witness), I could not find a circular or price list from the Cudahy Packing Company. So far as my knowledge goes, we have never bought Old Dutch Cleanser from The Cudahy Packing Company at any other price than \$3, billed to us at \$3, and we sell it at 3.40. We buy 25 cases at a time.

Q. During these years did the Cudahy man who was selling Old Dutch Cleanser in this neighborhood ever bring in to you any orders from anybody else for Old Dutch Cleanser?

MR. BAKER: I object to that as immaterial.

THE COURT: I do not see that that is pertinent to any question in the case.

MR. MONTAGUE: I take an exception.

(267) To the sustaining of the Plaintiff's objection aforesaid, to which exception was noted, and not permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and thirtieth and one-half bill of exceptions,

which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Q. Did you ever fill any orders for Old Dutch Cleanser during this period except those which were solicited by your own sales force?

Mr. BAKER: I object to that as being immaterial and leading.

The COURT: Sustained.

Mr. MONTAGUE: Exception noted.

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and not permitting the witness to answer, the defendant excepted, and now prays the court to sign and seal this its one hundred and thirty-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The WITNESS: We never had any contract with the Cudahy Packing Company in respect of the price at which we shall resell Old Dutch Cleanser.

Q. Do you or do you not, or did you or did you not in 1914, '15 and '16 feel free to sell Old Dutch Cleanser at any price you wished? A. Well, now, I do not know whether we feel free to sell that class of goods at any (368) price we wish. We handle a large number of similar goods that are billed to us at the factory's price, and we are supposed to sell at the resale price understood or established by the factory.

The COURT: You know that they expect you to sell at the resale price?

The WITNESS: Why, all manufactured goods of that sort, we are supposed to sell at the resale price. I do not think we have got any contract on any of those goods.

STUART EDGERTON.

The COURT: Do you feel that you are under a moral obligation?

The WITNESS: Well, yes, we feel that we are under a moral obligation. We do not cut the price because it would be bad business policy for us to do so. It would be bad business policy because it would simply cause our competitors to meet our cut price and probably go us one better.

Q. In other words, you would lose profit?

Mr. BAKER: I object to the question of losing profit.

The COURT: I do not see any harm in it, because it really seems to me, so far as it goes to sustain the plaintiff's case.

A. Yes; we would lose our profit by cutting the price.

Q. Do you sell at \$3.40 because you want the difference between \$3 and \$3.40?

Mr. BAKER: I object as to that.

The COURT: If that is the sole reason he sells it for that, and not because he feels it is not fair to the manufacturer to cut the price without telling him that he is actually doing it, why, he can testify to that.

Mr. MONTAGUE: I want him to give all of his reasons, your Honor. I do not want to pin him down to one reason only. I want to know all his reasons as to why he sells at \$3.40 Old Dutch that he buys at \$3.

(369) Mr. BAKER: And we object to that.

The COURT: I overrule it.

Mr. BAKER: Exception noted.

A. Of course, we want the profit. That is our primary object in being in business. We want a profit that we can legitimately get without being accused of overcharging.

The COURT: Is that the only reason you maintain the manufacturer's price?

The WITNESS: No, it is not the only reason.

The COURT: What is the other reason, or what are the others?

The WITNESS: The other reasons are that it would be bad business policy, as I stated before, to start a cut rate campaign on the goods, on which prices have been made by the manufacturer.

The COURT: Now, take a conceivable case that you might have, where a large order would come in, where the circumstances were such that there was no reasonable probability of anybody ever finding it out, where you could get that order by shading a manufacturer's price. Neither of the reasons you have just stated would apply there to that. Would there be any reason why you could not do that?

The WITNESS: Judge, we would not accept an order of that sort.

The COURT: Why not?

The WITNESS: Well, it is our policy not to do business that way; on the goods of that sort it is so hard to get a profit on many goods that we do handle, that when it comes to an article like Old Dutch Cleanser, Proctor & Gamble's soap, and hundreds of other articles of that sort that I might mention, we simply maintain the resale price, large or small order, it don't make any difference.

CROSS EXAMINATION.

By Mr. BAKER:

The WITNESS: I do not think the Cudahy Packing (370) Company ever asked us to maintain the price. I do not think they say in the circulars they want us to.

Q. Where did you get the price to sell at of Old Dutch Cleanser? A. I presume that we have had these price lists on this table in the office at some time or other, and we know the price from this list is \$3.40, and we sell it at \$3.40.

The COURT: Let me ask you this question: Apart from the question of business policy and what not, would you or would you not regard yourself as doing the square thing to the manufacturer and to the other jobbers to cut prices? Apart from the reason that you have given, would you or would you not feel that you were doing the square thing and the honorable thing if you cut the price? If you cut the price would you feel

STUART EDGERTON.

that you were doing something that the other jobbers and the manufacturers would complain of?

The WITNESS: Well, on goods of the character of Dutch Cleansers I should think that other jobbers would have a perfect right to complain to the manufacture if we did cut the price. That is not because we would not be selling it according to the instructions of the Cudahy Packing Company. I can not find that we have had any instructions from the Cudahy Packing Company. I do not remember that we have had any instructions from them as to that.

Q. I asked you whether or not you received a circular like that (handing paper to witness)? A. Well, the gentleman just brought some circulars up here, and we can not find in our office that we ever had them, but I presume we have had those circulars in our price.

Q. Don't you know, as a matter of fact, that the Cudahy Packing Company fixed the resale price on their goods?

Mr. MONTAGUE: I object to that, your Honor, in view of the fullness with which the witness has testified.

Mr. BAKER: I am cross examining him now, your Honor.

(371) The COURT: My own judgment is that he has indicated that he did know it. That is the impression I gathered from his testimony, that he thought the Cudahy people, like dozens of others, Proctor & Gamble's, and others, hundreds of them, fix their price, but he does not say it.

Q. Don't you know that that is the fact, that they name the resale price at which you are to sell the goods to the retailer, don't you know that to be a fact? A. I think that is a fact that is generally known by everybody that handles it, and that they are supposed to sell it at \$3.40 a case. We always do observe that price.

Q. And you observe it because the Cudahy Packing Company ask you to observe it? A. I do not know that they have ever asked us to do it or not, to cut it or not to cut it. We know that is the price that everybody sells it at. That all men sell it at that price, and we sell it at the same price.

Thereupon—

ARTHUR SCHWAB.

ARTHUR SCHWAB, a witness of lawful age, produced on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. MONTAGUE:

The WITNESS: My business is the wholesale grocery business, I have been in business close on to twenty years. The name of my house is H. Schwab & Son. We were selling Old Dutch Cleanser in the years 1914, '15 and '16, and are still selling it. We buy Old Dutch Cleanser at these prices:—If we buy 100, we pay \$2.97½—it depends upon the quantity we buy. If we buy 100, it is 2.97½ or 2.50, which we have paid. We sell Old Dutch Cleanser anywhere from 3.20 to 3.40; it depends on the quantity you buy. We have no contract with the Cudahy Packing Company as to the price at which we would sell Old Dutch Cleanser. We did not in 1914, '15 or '16 (372) have any such contract, nor any agreement at all.

Q. Were you in these years free, in your opinion, to sell Old Dutch Cleanser at any price you wished? A. Why, we never had any agreement of any kind. We felt free to sell the goods at any price we want.

CROSS EXAMINATION.

By Mr. BAKER:

The WITNESS: We sold it at any price we saw fit. That was a little different from the list price. We cut the price on it.

Q. To what extent did you cut the price? A. What do you mean, to what extent?

Q. Yes, I want to know?

The COURT: How long did you sell it?

The WITNESS: Well, we sold it in the quantities different. I do not know that we ever sold it below 3.20, but we have sometimes sold 10 cases at 3.20, or five cases.

The COURT: Mr. Schwab, when you sold it at 3.20, for five cases, did you bill it at 3.20?

The WITNESS: I think I did.

Q. Are you sure about that? A. Yes, almost positive.

ARTHUR SCHWAB.

Q. Did the Cudahy people find it out? A. I do not know if they found it out. I never asked them. I was not looking for trouble, or anything else. I never bothered with their business. I have my business. I do not look out for their business.

Q. What do you mean, you were not looking for trouble? A. I was not writing to them. I was not writing to my competitors, what I was doing, any more than I would go up to anybody and tell them what I was doing.

Q. You knew you were selling at a price below the list price? A. Below the list price—the only price that they issued, that their salesmen sold it for.

(373) Q. You knew you were doing wrong as far as the Cudahy Packing Company was concerned, didn't you? A. No, I did not think I was doing wrong.

Q. Why didn't you tell them? A. Why should I tell them? I did not have anything to do about telling them. Should I write and tell them my business.

Q. And you do not feel under any obligation, then, at all to observe the prices fixed by the Cudahy Packing Company? A. Yes, we do feel a little obligation to them.

Q. Just tell us how little, or how much of an obligation you feel in that matter. A. Because they do a great deal of missionary work, and they try to protect the jobber in that way by giving him a legitimate profit, and for that reason we think we should keep as near the price they give as we can.

Q. Do you feel under any obligation to keep it at that price? A. I feel that I am under obligation to keep as near the price as I can.

Q. Don't you know what if they found you were cutting the price they would cut you off? A. I do not know whether they would or not.

Q. You have never inquired whether they would cut you off or not? A. No, I have not inquired.

Q. You have never hinted to any one of their missionary agents that you were not selling at the list price? A. Hinted it to them?

Q. Yes. A. Why should I hint anything to them?

The WITNESS: (Answering further questions): There was nothing at all said by them. If I ordered Old Dutch Cleanser, I get it. I don't know whether any

complaint was made of me by anybody I know of to the (374) Cudahy Packing Company that I was cutting the price. When I bill it out I bill it out at the cut price.

Q. In what quantity did you bill it out at 3.20? A. I do not remember any more. Maybe five or ten cases, something like that.

Q. You billed it out at 3.20. Have you got any of those bills that you can produce here? A. No.

Q. Have you got some at your store? A. No.

Q. What has become of them? A. I suppose—I don't know, maybe in the book somewhere, I do not know.

Q. You know whom you billed it to, don't you? A. No. I do not remember that just now. I knew it was sold—

Q. Do you think you may find it? A. If I want to go around to some of my customers.

Q. How about Stewart & Company, did you sell them at 3.20? A. Yes.

Q. Well, now, can you get the bills—in what quantity? A. I do not think they would give me their bills.

Q. In what quantity? A. Ten cases, I suppose.

Q. Haven't you got any memorandum in your store showing the bill that Stewart & Company and the cases of Old Dutch Cleanser you sold them, and at what price they were charged? A. I suppose I have got them in my book.

Q. Will you bring it down? A. Bring my books down?

Q. Bring a memorandum down. A. The memorandum is in the book.

(375) Q. Bring the books down. A. I am on the stand telling you I did, and what else do you want to see?

Q. I want to see how you did it. A. I told you 3.20, didn't I? I am under oath, on the stand, and I told you 3.20.

Q. I want to see your books and how you did it, and what you charged? A. Three-twenty.

Q. I want to make sure about that, and I want to see your books.

The COURT: What was the list price for ten cases?

The WITNESS: At three-thirty, I think.

The COURT: And you sold it at 3.20 in ten case lots, and put that on the bill?

The WITNESS: Yes, sir.

ARTHUR SCHWAB.

The COURT: Any cover up of any kind on the bill?

The WITNESS: No. We did not do that. I am almost positive that is the way it was billed out.

Q. Any rebate or anything like that, anything of that sort? A. No, I think it was an article right there that would show itself.

Q. You are familiar with the literature of the Old Dutch Cleanser people, are you not? A. The list that they have, their resale list, I have seen.

Q. And you have seen right in their articles that they want you, or part of their instruction was, that you are to sell at their resale price? A. Their resale list, that they ask us to resell at this price, which we ordinarily adopt.

Q. And you do not feel morally bound in any way to sell at that price, you say? A. I told you before, we (376) try to adhere to that list, in amount 95 or 98 per cent of our sales, on account of the support that they give us.

Q. Why don't you always adhere to it? A. Because when we get a price, why, we generally do adhere to it, very nearly all the time. In a few instances we do not.

Q. You cut price to meet competition, do you? A. No, I do not know that it is competition. I guess there are some others that cut prices, the same way, yes, if I may answer that question.

Q. You cut price to meet competition? A. Yes.

Q. Now, I will ask you whether this does not show, this stamp, on the bills, as appears on this bill here (handing paper to witness), down here? A. Indeed, I don't know, unless I look it up.

Mr. MONTAGUE: May I look at that?

Mr. BAKER: Yes, certainly.

(Paper handed to Mr. Montague.)

Mr. MONTAGUE: I will admit that this is one of our bills.

The COURT: I know that, but is it your practice to stamp your bills with that rubber stamp in that way?

Mr. MONTAGUE: I will inquire.

The COURT: Yes, inquire as to that.

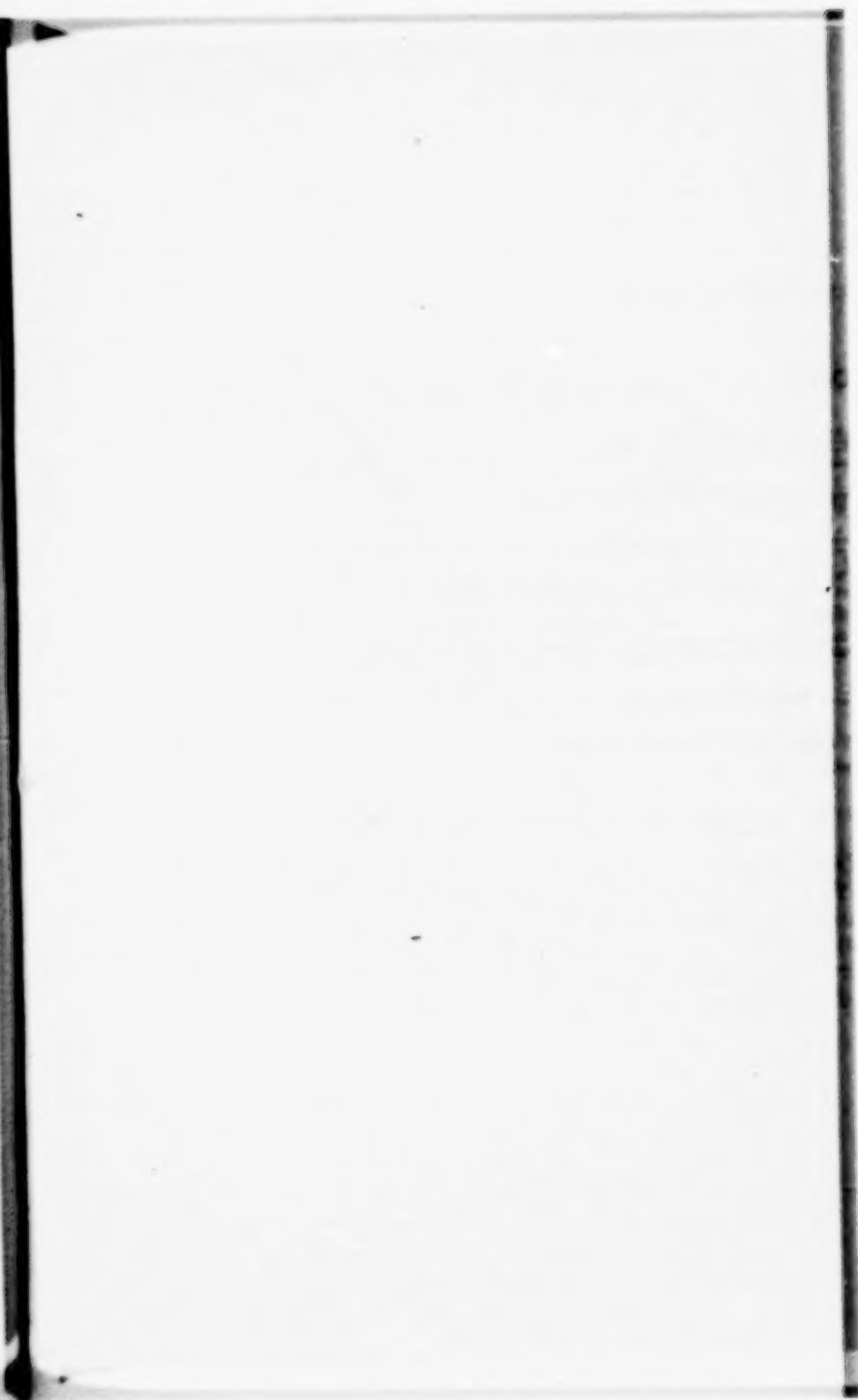
Mr. MONTAGUE: I will admit that on or about that

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time they did, but when they started in and stopped the practice, I do not know. I could not say that. I am going to put a man very soon on the stand on that. I do not know, your Honor. Before I end my case I will prove when we began that and when we ended with that.

MR. BAKER: I offer that in evidence.

(Paper referred to by counsel, having been offered in evidence, was marked "Plaintiff's Exhibit No. 400", which is as follows:)



PLAINTIFF'S EXHIBIT NO. 40.

R. H. Form 14 Special, 15M-1-10-13-Howe 20196

Years: _____

10% DISCOUNT ALLOWED AFTER
DATE FROM DATE OF INVOICE

60 days; 60 days net



NEW YORK, N. Y., AUGUST 28th 1913

Grey & Son, Inc.

Pratt St.

Balto., Md.

SEP 9 1913

BOUGHT OF THE CUDAHY PACKING CO.

SPECIALTY OFFICE

129 HUDSON STREET

All accounts must be settled with this Office.
Settlements subject only on Special Authority.

NOTICE: All products are sold, unless otherwise specifically stated, delivered to transportation company, in good condition, at current weights, after which our responsibility ceases. Loss on account of shrinkage, or damage of any kind, in transit, is at Buyer's risk. No employee or agent of this Company has authority to waive this rule.

Balto.

12C2

Delivered From Stock at

Sales Ticket No.

NOTICE—Prices based on weights or otherwise as per state-

ment on back hereof.

250 ENTERED DUTY ON (Regular) @ 3.00 less 5% per cs. 737.50 ✓

GOODS RECEIVED

ENTERED P. J.

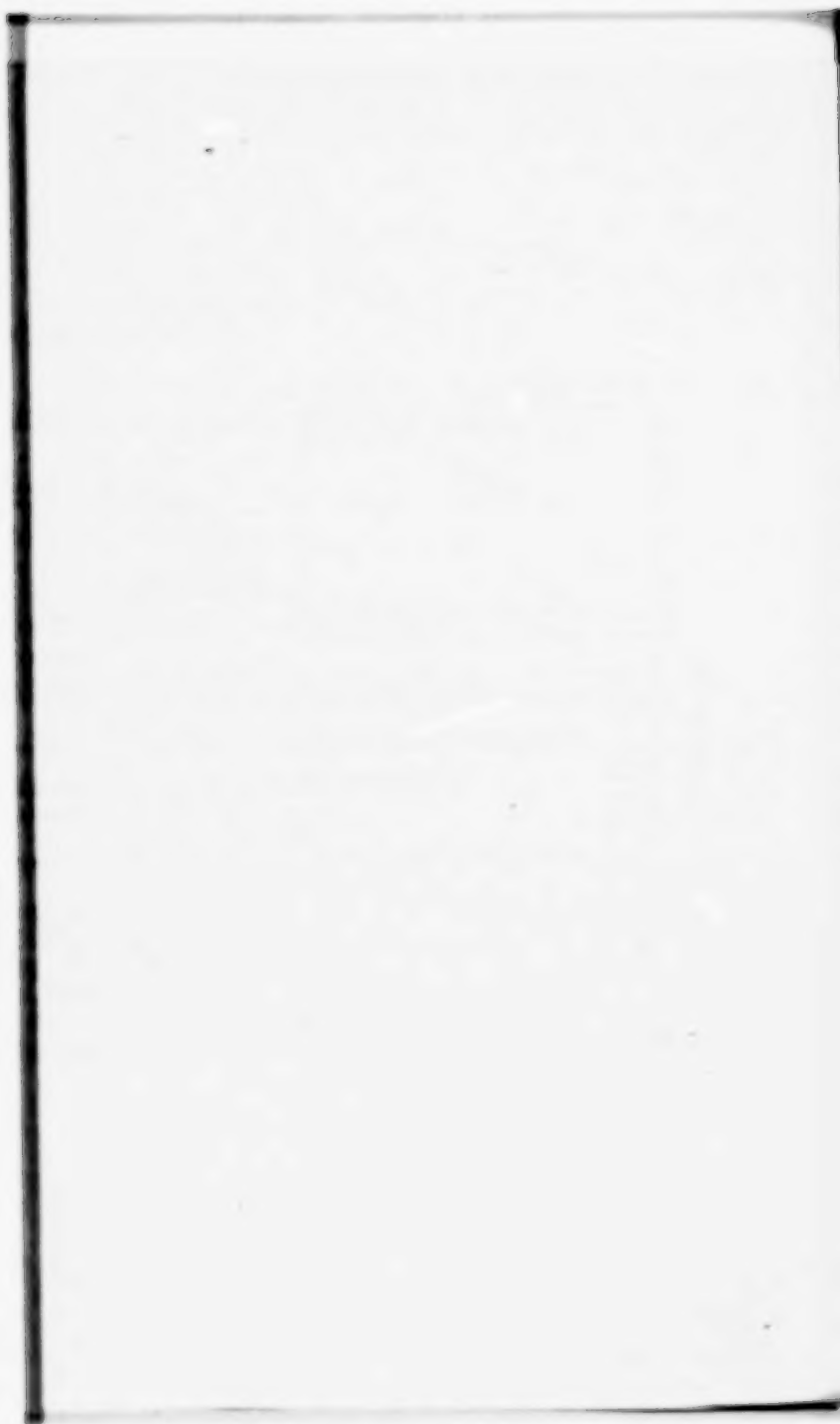
W. H. S. O. K.

W. H. S. O. K.

W. H. S. O. K.

ALL your QUOTATIONS, BIDS, SALES
and INVOICES for Dutch Cleanser
either to jobbers, semi jobbers, re-
tailers or consumers, should be at a
rate not lower than laid down in our
published General Sales List.

Plaintiff's Exhibit No. 40
U. S. DISTRICT COURT
FOR THE DISTRICT OF MARYLAND



ARTHUR SCHWAB.

(378) Mr. SMITH: I will read this: "All your quotations, bids, sales and invoices for Old Dutch Cleanser either to jobbers, semi-jobbers, retailers or consumers, should be at a rate not lower than laid down in our published general sales list". This is on the bills of the Cudahy Packing Company to Frey & Son.

Thereupon—

EDWARD T. DRURY, a witness of lawful age, produced on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. MONTAGUE:

The WITNESS: My business is wholesale grocer. The name of my firm is Drury, Lazenby & Company. I have been in business for twenty-five or thirty years; my present firm, for only two years. My place of business is in this City. I sell Old Dutch Cleanser at the present time. My present firm and its predecessor, E. T. Drury and Company was selling Old Dutch Cleanser in 1914, '15 and '16. We have been selling it ever since it has been on this market; we were selling Old Dutch Cleanser along in 1914, '15 and '16 at three-forty. I do not recall whether we had any contract with the Cudahy Packing Company as to that price. We did not have any agreement of any kind.

Q. Did you feel yourself free to sell Old Dutch Cleanser in those years, at any price you wished? A. Yes, we felt free to sell it.

CROSS EXAMINATION.

By Mr. BAKER:

The WITNESS: I do not know that the Cudahy people fix the price at which we sell to the retailer, Old Dutch Cleanser. They suggest a price, yes. They do not tell us to sell at that price. That is not part of their system. I have seen lots of their literature. I can not recall that I have seen any of their literature where you can not sell at any other price except as stated by (379) them. I have seen all their literature in respect to that in their jobbers' sheets. I do not know that they

expect me to maintain the price. I expect they want us to, yes, and we do maintain the price. We do sell it at 3.40. I suppose you call that maintaining the price.

RE-DIRECT EXAMINATION.

By Mr. MONTAGUE:

The WITNESS: Our object in selling at 3.40 is to make a profit, of course.

The COURT: Is that the only motive?

The WITNESS: Well, that is the principal one.

The COURT: Well, what are the others?

The WITNESS: Well, there are no others that I know of.

The COURT: Would you feel that you were dealing perfectly fairly with the Cudahy Packing Company and the other jobbers in town, if, in point of fact, you did sell at, say 3.30?

The WITNESS: No, I would not think it would be fair to anybody, certainly not fair to ourselves, and it would not be fair to the manufacturers or my competitors.

The COURT: Why wouldn't it be fair to the manufacturers?

The WITNESS: Well, because—I do not know just exactly why.

The COURT: What obligation are you under to your competitors?

The WITNESS: None whatever.

The COURT: I mean moral obligation. You said it would not be quite fair.

The WITNESS: If we were to cut a price we would naturally feel that a competitor would meet us, and it would result in no profit for any of us.

RE-CROSS EXAMINATION.

By Mr. BAKER:

Q. And the retailer getting it cheaper, it would result in that? A. Of course, the retailer would get it cheaper if you sold it for \$3 he would get it cheaper, and (380) if you sold it for 2.75 he would get it cheaper.

The WITNESS: (Being further questioned): If Cudahy & Company would fix the retail price at 3.50, I do not know whether we would or not sell it at 3.50. Very naturally we would want all the profit we could make

EDWARD T. DRURY.

out of it. I said that I thought it would be unfair to the wholesalers. I mean that the wholesalers would meet any cut that I would make, perhaps. I was selling at the same price that the other wholesalers were as far as I knew. I do not know whether Cudahy Packing Company would fix that price or not. I do not recall that he put in the circular that we were to sell one case at 3.40. We got the price of 3.40 from his selling agent. The agent did not tell us to sell at 3.40. He said that was the sale price for it.

Q. And you sold at that price? A. Most manufacturers fix the sale price.

Q. And he told you the manufacturer fixed the price?

A. No, I say to you that most of them do fix it. They suggest the price.

Q. And you sell at the price they fix? A. Yes.

Q. And you consider yourself morally bound to do that? A. Oh, I do not know about that. Yes, I think it is the only fair way.

Q. And you think it was unfair, not only to the manufacturer but to your other wholesalers to cut the price? A. Unfair to myself.

Q. Well, you said it would be unfair to the manufacturers a while ago? A. No, I do not think I said unfair to them.

Q. You said unfair to the manufacturers? A. I do not remember. I said unfair to myself.

(381) Q. You said a while ago it would be unfair to the manufacturers as well as the other wholesalers. What do you mean by that? A. Well, I say if we were to sell less than 3.40, then our competitors would naturally meet our profit.

Q. Why would that be unfair to him? A. That would be unfair to ourselves.

Q. Well, you said it would be unfair to him? I want to know why it would be unfair to him. A. I do not know. It would just cut his profit. If we wanted our competitor to enjoy the same benefits we did, then if we cut the price it would be unfair.

Q. Don't you know that the Cudahy people have a selling plan by which they fix the price that wholesalers sell retailers, and call you men distributing agents, and sell to you, if you will sell at that price? A. Oh, no, I do not know that.

Q. You do not know anything about that? A. I did

HENRY SNOW.

not feel that we were distributing agents. When we bought the goods we sold the goods, and we thought that was the only fair price.

The COURT: You do not regard yourselves as distributing agents?

The WITNESS: No. We buy goods and we sell goods, the same as we do any other commodity that we handle.

Q. You have not experienced any change in the last four or five years in your relations with the Cudahy Company, have you? A. No.

Q. Have been dealing with them just the same as you dealt with them when you first started? A. As far as I know, yes, sir.

(Testimony of witness concluded.)

(382) Thereupon—

HENRY SNOW, a witness of lawful age, produced on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. MONTAGUE:

The WITNESS: My business is wholesale grocers. I have been in business about twenty years. The name of my firm is Snow, Ward & Company. That has been the name of the firm since 1914. My place of business is in the City. I am selling Old Dutch Cleanser at the present time. I was selling Old Dutch Cleanser, in 1914, and have been selling all the grocers, all the general line.

Q. At what price have you been selling Old Dutch Cleanser? A. I think the price is 3.40, and then there is a range of price according to quantity. Part of that, though, to be candid with you, I only knew recently, about that twenty price, down to 3.20, because I went and looked one of the lists up.

Q. Is there any agreement between you and the Cudahy Packing Company as to that price? A. Not that I know of.

Q. Have you ever made any contract with them to sell at that price? A. Not that I know of.

HENRY SNOW.

Q. And do you feel absolutely free as to selling at any price you want on Old Dutch Cleanser? A. No, not absolutely free.

Q. Well, just tell how free you do feel, and just exactly how you feel about it? A. In a grocery business on a regular market, the profit is so very small that if a man cuts a very little bit he cuts all his profit out, and when a manufacturer is fair enough to try to give a wholesale grocer a little bit of profit, we feel really bound that we ought to try and maintain his price and we do.

(383) Q. When you speak of the manufacturer naming the price you mean the manufacturer notifying the world at large that that is the price mentioned and is a good retail price? A. As has been testified here, most of the manufacturers give us a price to pay for the goods for ourselves, and a price to sell them at, which they think is a fair margin of profit, some more and some less.

The COURT: Mr. SNOW, if you stand by the manufacturer in the sense of doing what he asks you to do, what do you expect him to do to you? In other words, if you sell at 3.40, and somebody around the corner in the same line of business is selling it for 3.30, what do you expect the manufacturer to do to you? If he asks you to sell at 3.40, or advise you to sell it at that price, whatever you choose to call it, and you do sell at at 3.40, and a competitor across the street, or around the corner is selling it at 3.30, what do you expect the manufacturer to do?

The WITNESS: I do not expect him to do anything.

The COURT: Will you keep on selling it at 3.40 under those circumstances?

The WITNESS: We have to do it. We have people cutting all round us on different articles, and we maintain the full price. That is occurring all the time.

CROSS EXAMINATION.

By Mr. BAKER:

The WITNESS: We are under no obligations to anybody to maintain the full price. When I buy things and pay for them, they are my goods, and I get what I feel like for them.

Q. How often have you cut the price on Old Dutch Cleanser? A. I do not recall cutting it at all.

Q. Didn't you say a while ago you felt you should not cut it? A. I feel we ought to protect any article of a manufacturer.

Q. Where he fixes the price? A. Well, when he asks (384) us to sell at a certain price, yes.

Q. You feel that way about it? A. We try to do it. Sometimes we can not do it.

Q. And you feel yourself morally bound to do it? A. No, there are no morals connected with it. It is simply a matter of business policy.

Q. In other words, you carry out the conditions upon which he sold you goods? A. We try to do it the best we can.

Thereupon—

ANDREW B. BANGHARDT, a witness of lawful age, produced on behalf of the defendant, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION.

By Mr. MONTAGUE:

The WITNESS: I am president of the Baltimore Wholesale Grocery Company and manager. The place of business of the Baltimore Wholesale Grocery Company is East Falls Avenue and Granby Street. I have been president of the Baltimore Wholesale Grocery Company twenty-three years this fall. The Baltimore Wholesale Grocery Company sold Old Dutch Cleanser in 1914. They have sold it continuously from that date up until the present time and now sell it. They sell it at three-forty. We have no agreement or contract with the Cudahy Packing Company regarding prices. We have no agreement with them whatever. We did not have any in 1914. We did not at any time have any. We feel absolutely free in our company to sell at any price we wish.

CROSS EXAMINATION.

By Mr. BAKER:

Q. Do you sell it at any price you see fit, or at the list price? You sell it at the list price, don't you? A. That is the list price, 3.40.

ANDREW B. BANGHARDT.

Q. That is what you sell it at, isn't it? A. Yes, sir.
(385) Q. And you don't cut the price on it? A. No, sir.

Q. You know that the Cudahy Packing Company expects you to sell it at 3.40, don't you? A. They never said anything about it.

Q. Didn't you have trouble with them, though, and they cut you off once? A. There was no trouble between us and the Cudahy Packing Company, but the Maryland Jobbers Company objected to selling us, and Mr. Frey was a member at that time and Mr. Strauss visited Baltimore, and did not know what to do on account of the pressure brought on account of the Maryland Jobbers Association, and we had an interview one evening, and after he left, the next morning I telegraphed to Mr. Strauss, and asked him if he would send us a carload of Old Dutch Cleanser, and his telegram came back promptly, Sure he would. I do not know whether the Old Dutch Cleanser people were to blame for it or the Maryland Jobbers Association.

Q. But you have never cut the price on it at all? A. No, sir.

Q. And you always sell it at the list price? A. Yes, sir.

Q. And you know the Cudahy Packing Company expects you to do that? A. I do not know what they expect. You would have to ask them about that.

Q. You have seen their literature? A. Yes.

Q. Don't you know it calls on you to do that? A. All manufacturers' goods have a jobbing price and a quantity price, and a jobber is supposed to get a reasonable profit for handling the goods, and in order to get that they must have a selling price to the retail grocer.
(386) Q. You do not fix the selling price of Old Dutch Cleanser, do you, the Cudahy Packing Company does that, don't they? A. All manufacturers do that, fix the price.

Q. And you adhere to the price of all manufacturers? A. Yes, I do.

Q. And when you buy goods you buy them with the understanding that you are going to do that? A. Well, it seems to be a general custom, to fix the price for the jobbers.

Q. And you obey that custom? A. Certainly we do.

Q. Does the manufacturer of flour and sugar fix the price at which you sell? A. They are not manufact-

urer's goods. We buy our flour from Grafton, in car-load lots, and put it out under our own brand. Sugar you can buy anywhere; and they are not manufacturers' articles. When you come down to manufacturers' products, that is about 25 per cent of the stuff, and about 75 per cent is anybody else's goods, and sell at any price, but at any price and sell at any price you wish. There is no restriction there. We do not consider it restriction, the price to the jobbers.

Q. How about Quaker Oats? A. Quaker Oats we sell at the list price.

Q. And you sell everything at the list price that the manufacturer asks you to sell it? A. If he asks us to sell, yes, if he sends us a price list. There are some manufacturers that do not care what you sell their goods at, it is immaterial.

Q. But with those that do care, you carry out their instructions? A. Yes, we do, because we feel that—

Q. And those where you carry out their instructions, where they fix the price to the retailers, why, there (387) is no competition in price, then, among the wholesalers? A. Oh, yes, the wholesaler sells at whatever price he pleases, after the price—I have known jobbers in Baltimore to sell fixed price of 2 per cent cash discount right out.

Q. But you do not sell Old Dutch Cleanser at 2 per cent cash discount? A. No, we do not.

Q. And you do not do it because the list price is otherwise? A. We are co-operative, a co-operative association.

Q. And you co-operate with the Cudahy Packing Company people on the price? A. No, we co-operate with our people, our members, retail grocers, I am a retail grocer myself, and have been for 27 years. We realize that a manufacturer is entitled to a reasonable profit on his goods, and we also realize that a jobber is entitled to a reasonable profit on his goods. Neither one could do business without it.

Q. And you let the manufacturer fix the price at which you sell to the retailer? A. It is generally at about ten per cent.

Q. Will you answer my question? You let the manufacturers fix the price at which you sell to the retailers? A. Well, it hardly ever comes under discussion, that question don't. A regular custom.

ARTHUR SCHWAB.

Q. Well, then, you do let the manufacturer fix the price at which you sell his goods to the retailer? A. He don't fix it to us arbitrarily.

Q. You do not know what profit he makes out of it at all? A. No, he has to protect his business by getting somebody to sell his goods, and that somebody expects some pay for handling the goods.

Q. And he fixes the price at which you sell to the retailer? A. Yes, but that price is not adhered to, by hardly any jobbers.

Q. I thought you said a while ago you did adhere to it as far as Old Dutch Cleanser was concerned? A. We do.

Q. That is all. A. Not in the whole line, though.

Mr. BOWIE: Mr. Schwab, who was excused from the stand yesterday for a few moments was to get an excerpt from his books and he is present with the book and the excerpt. I suppose my brother will want to conclude his cross examination.

Thereupon—

ARTHUR SCHWAB, a witness heretofore, whose examination was temporarily suspended, pending adjournment, resumed the stand for

CROSS EXAMINATION (Continued).

By Mr. BAKER:

The WITNESS: (Answering questions): I have the book with me. I show you a copy of the bill. I am just showing you the one with the Dutch Cleanser on it. \$16.50 on this bill is the price which we generally get. That is the price they have on their list, the list price, and I take off fifty cents. This is to Stewart & Company on August 29th, \$16.50, with fifty cents off. That is the way the bill rendered to Stewart shows.

RE-DIRECT EXAMINATION.

By Mr. BOWIE:

Q. That is the net price that you billed and makes it how much? A. \$3.20 a case for five cases.

(389) Mr. BOWIE: If your Honor please, we wish to

ARTHUR SCHWAR,

offer in evidence the deposition of Mr. Emil A. Strauss of the Cudahy Packing Company taken, as your Honor knows, in Chicago.

Mr. BAKER: We object generally to the deposition on the ground that on cross examination Mr. Strauss refused to answer certain questions that were put to him and we gave notice at that time that we would move to suppress the deposition on that ground. I have examined the deposition itself and so far as the testimony is concerned, except what his name is and what office he occupies, it seems to me that nearly all of the evidence is inadmissible.

The COURT: I will say that in consulting with counsel on each side I have gone over that deposition. I would say that the deposition is very unimportant except as explaining how it comes about that the person who figures as E. A. S. in certain correspondence is not here in court. I think it is fair for the defendants to have that before the jury and that is not affected by your objection. I think it is perfectly proper that that should come out, as it does in his testimony, that the name Old Dutch Cleanser and the picture and so on is a trademark. I do not think it has any real bearing on the issues in the case except to make plain what the thing is.

Mr. BAKER: We will admit that, of course.

The COURT: That much of it, I would say, is admissible, I read over the rest of it and it does not seem to us that under the ruling of the Circuit Court of Appeals that any of the rest of it that is important enough to take the trouble to segregate from the mass of testimony would be admissible. I also think that the objection (390) made by counsel to that portion of it that he declined, under the advice of his counsel, to submit to on cross examination, to be legitimate cross examination and renders it necessary, in any event for me to exclude the portions of the deposition to which that cross examination properly applies. So I shall decline to let anything come in except down to that part on Page 9, or wherever it was, that I marked, unless counsel for plaintiff wants it in.

Mr. BAKER: No, sir, we do not want it in. We think it is inadmissible under the decision of the Court of Appeals.

The COURT: If you really think there is anything

ARTHUR SCHWAB.

in the rest of that deposition that is not open to either one of the two objections that I have set forth, and is of enough importance to make it worth while to ask me to let it in, I will rule on it.

Mr. MONTAGUE: We necessarily hold, your Honor, as to each and every question and as to all the other questions separately or together that the testimony is admissible. I shall, therefore, press my offer of the deposition.

Mr. BOWIE: I would like to suggest this thought to your Honor, which perhaps at the time you read this deposition over was not in your mind: The line of the testimony that was going to come out in this case was not before you and necessarily in passing upon it you passed upon it in the light of the general proposition and before you absolutely exclude it I want to point out this, that the questions which we declined to answer were questions going to the private details of business that had no relation to this business.

The COURT: The whole testimony of Mr. Strauss in substance was in explaining that the requirements of your business required you to do certain things, and therefore what the requirements of your business were perfectly proper for cross examination.

Mr. BOWIE: But not the detailed prices; it was a (391) fishing expedition.

Mr. BAKER: I want to make this suggestion, however, there might be in this examination in chief some one question that is admissible—I do not believe there is—but I think all of it is subject to the general objection.

The COURT: I sustain both the objections. I think that as I read that testimony it is impossible to accept in evidence, except as I say this part right at the beginning, because the man declined, and under advice of counsel for defendant, declined, to make a full disclosure on cross examination. Secondly, because so far as I am able to see upon going through that mass of testimony, there is nothing in it that is not, under the rulings of the Circuit Court of Appeals, inadmissible. If any one question or answer might here and there be picked out, it would have no real importance to anybody in the case and would be hard to understand without reading it in connection with that which is inadmissible.

Mr. MONTAGUE: We note an exception.

To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and excluding the testimony aforesaid, the defendant excepted, and now prays the court to sign and seal this its one hundred and thirty-second bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. BOWIE: I understand that we may read to this point at page 9 which you have marked?

The COURT: I think so. I will say that where a man comes forward to explain the business policy of a corporation as requiring the doing of something, the legality of which is debatable at least, because we are having a (392) suit about it, counsel for defense can not complain if it is excluded when counsel for defense themselves advised against a full and frank answer under cross examination.

Mr. BOWIE: We were thoroughly sincere in our advice because we did not think that the cost of production had anything to do with the selling price.

The COURT: My impression is that neither the cost of production or your method of selling had anything to do with the case, and whatever your reasons are you must conform to whatever the law provides.

Mr. BOWIE: We concede that, your Honor.

(Deposition of Mr. Strauss read by Mr. Bowie to the point marked on page 9 by the Court.)

(Deposition then offered in evidence marked Defendant's Exhibit W, and reads as follows:)

(393) EMIL A. STRAUSS, a witness of lawful age, called on behalf of the defendant herein, the whole truth and nothing but the truth, deposeth and sayeth as follows:

DIRECT EXAMINATION.

By Mr. MONTAGUE:

Q. What is your name? A. Emil A. Strauss.

EMIL A. STRAUSS.

Q. Are you over the age of 21 years? A. Yes, sir.

Q. What is your residence? A. Chicago.

Q. What is the street address? A. 21126 East 48th Street.

Q. In what capacity are you employed by the Cudahy Packing Company? A. Department Manager.

Q. In what department? A. Soap Department and Cold Dutch Cleanser Department.

Q. How long have you been employed in that capacity? A. About 18 or 20 years.

Q. Were you employed by the said Company in that capacity during the years 1912, 1913, 1914 and 1915? A. Yes.

Q. The defendant company herein is the Cudahy Packing Company of Illinois. Is that the Company by which you are now employed?

MR. SMITH: I object to that on the ground that it is immaterial and irrelevant.

A. As I understand it, the Cudahy Packing Company of Illinois was changed over to the Cudahy Packing Company of Maine during the fall of 1915; I believe that is correct. I have been employed by the Maine corporation since that time.

MR. SMITH: I move to strike that out for the same reason.

MR. MONTAGUE: How many years have you been occupied in the employ of the Cudahy Packing Company? Before you answer that,—What is the present state of your health, Mr. Strauss? A. Why, I have gone through a very severe and serious sickness quite recently and I have only been out of the hospital for about three weeks and am still under the doctor's close supervision and care. I am practically not attending to business actively at all.

Q. What was the nature of your illness? A. Well, it was a complication of conditions, especially resulting in an abscess in the nose.

Q. Did it necessitate an operation? A. Yes, I had two operations.

Q. When did they occur? A. Towards the end of March.

Q. Were you confined in the hospital at the time? A. Yes.

Q. And how long have you been out of the hospital? A. About three weeks.

Q. Under whose care have you been throughout that period? A. Well, I have really had the attendance of three different doctors, but I have been specifically under the care of Dr. Joseph L. Baer.

Mr. MONTAGUE: I now offer in evidence the certificate of Dr. Joseph L. Baer, dated May 12th, 1917, upon which was procured from Judge Rose the order directing the taking of these depositions.

Mr. SMITH: I do not think that the last part of that (395) statement is in accordance with the fact. If you remember, you brought that in in order to get a postponement and the court did not grant the postponement but said under the law you had a right to take the deposition.

Mr. MONTAGUE: Well, this at least states the facts, that the exhibition of this certificate to Judge Rose preceded his order made in open court, directing the taking of these depositions. I ask that that be admitted in evidence.

(The document referred to is marked Defendant's Exhibit A, and is as follows:

DEFENDANT'S EXHIBIT A.

DR. JOSEPH L. BAER,
104 South Michigan Avenue,
Chicago.

To Whom it May Concern:

This is to certify that Mr. Emil A. Strauss has been under my care for three months past. He had a violent infection of the upper lip requiring operation and carrying with it the risk of blood-poisoning and meningitis. This infection was complicated by a severe diabetes of many years' standing and Mr. Strauss was on the verge of diabetic coma for weeks. He was in the Michael Reese

EMIL A. STRAUSS,

Hospital for over a month and has been out of the hospital and under my care for about two weeks. He is at present free from sugar and acetone but both these reappear in his urine on the slightest excess exertion or mental effort. He is therefore incapable at present of giving attention to his business except for a few minutes each day.

For the next month he will have to remain under my daily observation and care and will be unable to travel (326) or appear in court until the latter part of June at the very earliest.

I might say that I am attending physician to the Michael Reese Hospital, Fellow of the Amer. Coll. of Surgeons, Member of the Chicago Gynecological Society, etc.

Sincerely,

JOSEPH L. BAER,

S. M. M. D.

May 12, 1917.

Q. I hand you Defendant's Exhibit A, Mr. Strauss, and ask you if the statement therein contained, so far as they relate to yourself and your condition and your care by Dr. Baer, are true?

Mr. SMITH: I object to that on the ground that it is irrelevant and immaterial.

A. (After examining Exhibit A.) Yes, that is quite correct.

Mr. MONTAGUE: Q. Have you been under Dr. Baer's care for the past three months? A. Yes, sir.

Q. Did you have a violent infection of the upper lip, requiring an operation?

Mr. SMITH: The same objection.

A. Yes, sir.

Mr. MONTAGUE: Did this operation carry with it the risk of blood poisoning and meningitis?

Mr. SMITH: The same objection, and because the question is leading.

A. Yes, sir.

Mr. MONTAGUE: Q. Refreshing your recollection from Defendant's Exhibit A, will you tell me what the (397) nature of your illness was in detail?

Mr. SMITH: I object to that because it is irrelevant and immaterial to any of the issues involved in this case.

A. Will you please repeat that question?

(Question read.)

A. It is pretty hard for me to give you the exact medical terms, but I have been a diabetic sufferer for many years, at least for some years which condition developed into a severe and acute state and from which an abscess on my upper lip and nose resulted, accompanied by a high fever and, as I understand it from the doctors, a very serious condition during the period when the stage of the illness was at its height.

Mr. MONTAGUE: Q. Have you throughout that period been under the daily observation of the doctors? A. I was in the hospital and under the doctors close care and even before I went to the hospital, for about a week of that time, I reported to my doctor daily.

Mr. MONTAGUE: Q. Are you now able to travel?

Mr. SMITH: That is objected to for the same reason.

A. No.

Mr. MONTAGUE: Q. Are you able to attend to business throughout the usual number of hours per day?

Mr. SMITH: That is objected to on the ground that it is immaterial and irrelevant.

A. I am not regularly attending to business at all.

Mr. MONTAGUE: Q. How many years have you been engaged in marketing Old Dutch Cleanser for the defendant? A. Since its inception.

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(398) Q. When was that? A. In the middle of the year 1905.

Q. For what purpose is Old Dutch Cleanser intended?

Mr. SMITH: Objected to on the ground that it is irrelevant and immaterial.

A. It is intended as a scouring and cleansing powder and for general household uses in that direction.

Mr. MONTAGUE: Q. When was the name of "Old Dutch Cleanser" adopted?

Mr. SMITH: Objected to for the same reason.

A. At practically the time of the beginning of our marketing of it.

Stipulation.

It is Hereby Stipulated and Agreed By and between counsel for the respective parties hereto that, to each question asked by counsel for the defendant, the plaintiff makes the objection that such question is incompetent and irrelevant and immaterial, and that to each question asked by the plaintiff's counsel, counsel for defendant objects on the ground that it is incompetent, irrelevant and immaterial and that this stipulation shall apply to all questions asked by either counsel throughout the taking of this deposition in addition to any other objections that may be subsequently specifically stated.

Mr. MONTAGUE: Q. When was the trade mark, consisting of the picture of the Old Dutch woman with the stick, adopted?

Mr. SMITH: That is objected to as leading.

Mr. MONTAGUE: Withdraw that question.

Q. What was the trade mark or picture or figure which was adopted in the marketing of Old Dutch Cleanser? A. What was the figures?

(399) Q. Yes. A. A figure representing a Dutch peas-

ant woman with a hood and wooden shoes as representing national costume,—in other words, in the national costume.

Q. Were the colors used in the portrayal of this figure and picture, substantially the same when you began as they are at the present time? A. Identically the same.

Q. Has there been any change throughout that period in either the name or style or the coloring of the trade name or the trade figure or the lettering and so forth? A. No.

Q. Old Dutch Cleanser. Why did you choose any name or figure or any characteristic dress for Old Dutch Cleanser? A. So as to identify the particular goods to the trade and to the public in such a manner as to make them distinct from every other competing or similar product.

Q. Did you adopt a plan in respect to the marketing of Old Dutch Cleanser? A. Yes, sir.

Q. Before adopting such a plan, did you make any preliminary study of the market conditions? A. Yes.

Q. What was the study? A. It was a study dating back for a number of years, based on the conditions surrounding the marketing of so-called "specialties" as generally marketed through the trade that we came in contact with and that we had learned about from other people who were similarly situated in regard to the distribution of such products to the public through the known channels of trade.

Q. Had you, previous to your marketing of Old Dutch Cleanser, had experience in the marketing of any specialties in other lines? A. Yes, sir.

(400) Q. What other lines, Q. Well, we had been in the soap business for a number of years and were of course, engaged in our packing and general business likewise. Especially we had had experience in marketing a light floating soap similar to and in competition with "Ivory Soap" and other soaps in that particular class.

Q. Is Old Dutch Cleanser sold by substantially the same line of trade that handles these other things that you mention? A. Identically the same class of trade.

Q. State now the essential features that this study led you to adopt in the plan for marketing Old Dutch Cleanser? A. The features that led us to adopt a plan?

(Question read.)

A. We found that the only practical way to market a specialty, such as Old Dutch Cleanser successfully was by following a uniform plan of promotion involving the education as to the merits of the goods, of the general public and finding the proper medium of distribution to the public through the so-called trade channels, wholesale and retail.

MR. SMITH: I move to strike out the answer because it is a conclusion.

MR. MONTAGUE: Q. Did your preliminary study of marketing conditions lead you to undertake yourselves the promotion of Old Dutch Cleanser through all channels of trade down to the ultimate consumer? A. Yes.

Q. What considerations led you to undertake this universal promotion of Old Dutch Cleanser throughout all these channels of trade down to the consumer? A. The consideration of eventual success, of course. We knew that we would have, in order to get a general and (401) generous distribution, we had to have the consumers' approval through educational methods and of course a distribution through the wholesale and retail grocers or other merchants engaged in similar lines.

Q. Did you utilize direct selling to the retail trade? A. We never followed that custom.

Q. Why didn't you? A. It was a question of economy.

Q. Why would it have been less economical for you to have sold directly to the retail trade? A. At that time,—and it is about 12 years ago,—the retail trade, the number of retail merchants whom we would have had to reach, was about 400,000, and, at the same time, the number of wholesalers distributing to these 400,000 retailers, was approximately 4,000. These jobbers have their own salesmen and they solicit all of their trade steadily, some of them daily and, as a consequence they do it at a minimum of expense. Whereas, if we sold to that 400,000 retailers direct, it would take a force of salesmen which would involve an expense to such an extent as to make the price either impossible to the consumer, or so much higher that it could not have been a practicable merchandising proposition. In fact, the method

of direct distribution to the retailer, from a national distributing standpoint, I do not believe is followed by any specialty house, for that one reason from an economical standpoint, and expense standpoint.

Q. How did you go about your promotion work among these jobbers? A. At a conference of our officers, we adopted a policy of making an investigation (or an experiment) I should say) in New York City,—Greater New York. I went to New York in the early fall of 1905 with an appropriation, and tried the market from various standpoints of promotion and merchandising. The jobbing trade and the retail trade were absolutely impossible of being reached. We could not reach them at all. They treated us the same as they treat other specialty propositions that are new. They simply stated that they had so much of that sort of thing presented to them daily that they could not undertake to give it any consideration or even help. So it was "up to us"—up to me at that time,—to interest the merchandise trade, both jobbing and retail, by reaching the highest percentage of the public and the consumer. We tried all sorts of means; we spent a great deal of money in advertising of every imaginable kind including bill posting which we followed to a large extent, on a large scale; street car advertising; painted signs; electric signs, store work, meaning advertising placed in stores that we were able to interest, all of which we found of very negligible effectiveness, and after two or three months we adopted a policy of house to house canvassing and the placing of a fair sized sample in every home by our own directly paid solicitors, which involved a very material expense and considerable work and which we carried along for some six or eight months, if I remember rightly, in the City of New York proper alone. I stayed in New York practically all of that time with the one object, and we gradually found a little response which, as we saw it, was encouraging and there was the continuance of the advertising which kept going on and our salesmen, in working the retail trade on behalf of the jobber, were gradually able to pick up an increasing volume of business. Of course it really cost us more than the value of the goods for that particular development and the investment was very large. In fact, at one time, we were greatly disturbed over that feature of it. However, following the little demand that we were

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(403) gradually able to build up amongst the retail merchants, having its inception in the demand coming in from the consumer, we were able to go to the jobber and I remember very well that the jobber almost uniformly turned us down, would not handle the goods even then. At that time, in order to get a start with the wholesale trade, we had to guarantee the sale of the goods and promise to take them back in case they did not sell. We never had to take any of the goods back exactly, but we did have a very hard row to hoe in eventually getting the jobber to understand that we were doing the thing in a practicable way and that we were not alone making "a spurt", as a lot of specialty houses did on their goods, and then quit them and leave the jobber with a lot of product, but that on the contrary, we followed it up and wished to create a business on a product that had merit, especially so when backed up by the Company that they had all done business with in other directions or in the same line. So we gradually got a little business that way, and we got it built up and developed, and it has grown without exception ever since.

MR. MONTAGUE: Q. In addition to putting the samples in houses, what other work in the nature of demonstration work did you do? A. In addition to the samples?

Q. Yes, what other? A. We did demonstrating and demonstrating means employing girls, all experts or girls who had been taught to be able to go into a home and show the housekeeper the advantage in using Old Dutch Cleanser as against some of the other products (404) that they were using, in other words, promoting the consumption of our goods through a practicable demonstration of them.

Q. You mentioned advertising that you did, for the purpose of reaching the public and the ultimate consumer. Just state specifically what kind of advertising this was? A. Do you mean the bill posting?

Q. And what else, if anything? A. Street car advertising; sign-boards painted; iron signs in the elevated and subways; electric signs. In fact I believe that we followed every established mode of advertising.

Q. Was this being aimed primarily at the public, or at the trade? A. Altogether at the public.

Q. Were you selling directly to the public? A. We followed that line of promotion.

Q. I mean, were you selling directly to the ultimate consumer? A. We never sold goods excepting to the wholesalers directly.

Q. And even while you were advertising directly to the consumer and the public, you never sold, except to the wholesaler? A. Never sold except to the wholesalers.

Q. Did you ever sell, as a general rule, to the retailers? A. Never.

Q. Not as a general rule? A. No, we never sold to the retailers.

Q. Did you ever cultivate or solicit the trade of the retail dealer, the retail trade? A. Only in so far as it was trying to merit and hold their good-will, but never by direct solicitation of their business.

Q. What did you do in the way of soliciting or cultivating the retail trade? A. We followed about this plan: (405) we went to the retail dealer and showed him what we were doing to interest the public, to interest the consumer. We called his attention to the merit of the goods. We undertook to interest him in the goods by showing him fair and proper treatment and by telling him that it would be our aim to try to uphold him in a fair and proper way and that so far as we reasonably could, we would do so.

Q. Did you give him any pieces of advertising matter, or anything to assist in the sale of the goods? A. Yes, we followed with a very large line of so-called "store advertising methods," individual pictures and booklets giving a history of the proposition and the merits of the goods and the modes of use; with painted signs in his windows, we made displays in his windows and put in people to demonstrate the goods in the store.

Q. Now, these people who went around with this advertising material, were they your employes or were they employes of the wholesalers? A. No, they were our employes.

Q. They were your own men? A. Yes, sir.

Q. Were they paid entirely by you? A. Entirely by us.

Q. Was their work entirely for the purpose of going around to the retail trade in the fashion you have described? A. Yes, sir.

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Q. Did you instruct these men to accept any orders from retailers whom they visited and to whom they explained your advertising and your policy regarding Old Dutch Cleanser? A. Only for account of the distributing agent—the jobber.

(406) Q. Explain just how these solicitors of your took these orders and what they did with them? A. Well, in order to unify our methods for about as many as one hundred men in that way, we gave them instructions exactly how to word their inquiries. They were to say to the retailer, after they had agreed upon an order, "Through what wholesaler will you have these goods delivered and shipped or billed?" We never tried to influence them as to what course they might follow in that respect.

Q. As between two wholesalers, both handling Old Dutch Cleanser, did any of your solicitors ever try to prefer one wholesaler as against another? A. No, it would have been directly contrary to instructions if they had, and we would not have allowed it if we had known of it.

Q. Do you regard this impartiality of your solicitors, as regards wholesalers, as an essential feature of your plan of marketing Old Dutch Cleanser? A. Absolutely.

Q. Why is it essential? A. As a matter of equality and fairness.

Q. Would it effect your sales and distribution of Old Dutch Cleanser if it were otherwise? A. It naturally would.

Q. Why would it? A. Well, if one jobber found that we were favoring another jobber, he would naturally favor somebody else as against us; whereas if we distributed the work of our solicitors according to the wishes of the retailer we were not involved at any time.

Q. From your observation, should you say that wholesalers handling Old Dutch Cleanser, generally treated you with complete impartiality in that respect?

(407) A. I think that can be said to be the case absolutely.

Q. Have the answers which you have given to me related to this experimental work which you have described in New York? A. Yes, sir.

Q. In the extension of the promotion of the sale of Old Dutch Cleanser from New York to the rest of the

country, have you found the same conditions such as you have described as characteristic of New York? A. Yes, sir.

Q. In your experimental work in New York, what assistance, if any, was rendered in the promotion of Old Dutch Cleanser by jobbers and jobbers' salesmen? A. In the beginning we had absolutely no help. As the goods gradually became known and the demand was created in the trade, the jobbers took such a nominal interest as the general business warranted but directly and specifically we had no support or help from them.

Q. Why didn't you get any support from the jobbers in the beginning?

Mr. SMITH: I object to that as not competent, the witness is not competent to answer that question.

Mr. MONTAGUE: Q. From your experience in the marketing of goods in the grocery line, can you tell why you got no support from jobbers and jobbers' salesmen in the beginning of the promotion of Old Dutch Cleanser? Can you, or can you not tell? A. Yes, I can.

Q. Why did you fail to get support from jobbers and jobbers' salesmen in the beginning of your promotion of Old Dutch Cleanser? A. Naturally the jobber did not know anything about what we would eventually do with Old Dutch Cleanser as to introducing it and following it up and developing an interest in the trade in it. I know and I was told in my contract with the jobbing trade, that it was the policy of the jobber to avoid taking up new things of that kind, especially so-called "specialties," articles of that kind, because they had been burnt so often; that if we would create a demand, they would be glad to handle the goods, but they would not even take them into stock, much less give us any practical support or help in introducing them, otherwise. That they had no opportunity or time themselves, or through their sales force to do anything of the kind, having had any number of adverse experiences in other lines.

Q. As you continued your own promotion of Old Dutch Cleanser, did you overcome this difficulty? A. Only very gradually and only as the demand and the growth of the trade on the product warranted it.

Q. In working out your plan for the distribution of

EMIL A. STRAUSS.

Old Dutch Cleanser, did you consider the question of price and quantity lots and cash discounts and credit terms? A. Yes.

Q. Freights allowances and so forth? A. Yes.

Q. What considerations did you take into account in respect to these various payments? A. Why, the ultimate object of getting the largest possible business on the product and of securing the good-will and fair consideration of the trade?

MR. SMITH: I move to strike that out as not responsive to the question.

MR. MONTAGUE: Q. What schedule of prices did you decide upon? A. What schedule of prices?

Q. What schedule of prices did you decide upon? A. A price for quantity lots, ranging from single boxes up- (409) ward, to the general trade, with a compensation or allowance to our distributing agents who were regularly classed as such.

Q. Did you allow a different price for quantity lots from what you did for a single boxes? A. Yes.

Q. Did you provide a different price for 5-box lots from what you did from car-load lots? A. Our prices to the general trade were based on single boxes, 5-box lots and five up to ten, ten to twenty-five and upward.

Q. When you speak of the general trade, are you referring to the general retail trade? A. Yes, to the general trade that we solicit for account of the distributing agents.

Q. You refer to the trade outside of the distributing trade? A. Yes.

Q. Does that necessarily include only retailers or may it include also the wholesaler? A. It includes all trade of whatever kind except our regularly appointed distributing agents.

Q. In arriving at your prices, did you have in mind any approximate price at which a can of Old Dutch Cleanser would be sold to the ultimate consumer? A. We have always and uniformly and fixedly advertised Old Dutch Cleanser to the ultimate consumer at ten cents a can.

Q. In what form has that price been associated in your advertising with Old Dutch Cleanser? A. Why, in the form of a specific statement to that end.

Q. Contained in the advertisements? A. Yes, sir.

Q. In working out your prices for a case and for five-case lots and for car-load lots, how did you allow for the profit to the retailer and to the distributing agents?

Mr. SMITH: I object to the use of the word "profit" there.

(410) Mr. MONTAGUE: Well, I will change the question and say, "compensation," and let the question stand without objection.

Mr. SMITH: Well, I object to that.

Mr. MONTAGUE: I will leave the word "compensation" in.

(Pending question was then read.)

Mr. SMITH: And furthermore I object on the ground that the question is leading.

Mr. MONTAGUE: I will withdraw the whole thing.

Q. In arriving at your schedule of prices, did you allow any compensation to the retailer and to the distributing agents?

Mr. SMITH: I object to the use of the word "compensation."

A. Our basis of prices being ten cents a can, we figured from that basis in arriving at the price that we considered practical and fair to the retail trade, and that price to the retail trade involves substantially an average profit of 50 per cent on the retailer's cost. The retailer's cost is based on single box lots at \$3.40; 5-box lots at \$3.30; 10-box lots and upwards in each case, \$3.25; 25-box lots and upwards, \$3.20; cash discount of two per cent if paid within cash discount period of ten days from date of invoice. In turn compensation to the distributing agents, is calculated by us on a fair allowance as I know it to be governed in the trade on that class of goods, soap, soap powders, scouring soaps and

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the like. So that the distributing agent's profits averages approximately 13 to 13½ per cent, being based on the allowance of 40 cents a box on the single box price, on \$3.40 to the retailer with an additional allowance of two and a half cents a box in minimum 100 case lots and upwards, five cents a box on minimum 250 case lots and upwards, seven and one-half cents a box on minimum (411) car-load lots and the same discount for prepayment, that is, two per cent.

Q. Does this schedule of prices permit of the retailer selling cans of Old Dutch Cleanser to the consumer at a price below ten cents? A. Yes.

Q. Do you know whether in fact retailers customarily sell Old Dutch Cleanser, when sold in more than single can lots, at prices below ten cents per can? A. It has been a matter of continued performance in all of our experience, that the retailers have generally cut the price, particularly with larger sales.

Q. In what form, or at what price have they thus frequently sold Old Dutch Cleanser? A. Well, one of the popular prices is "Three for a quarter,"—three cans for twenty-five cents.

Q. Has your Company in any way, either by suggestion or otherwise indicated any disapproval of this practice? A. No. It has been our aim to let the trade know that ten cents was the consumer's price, and we have not felt at liberty to go beyond that.

Q. Have the answers that you have given to the foregoing questions applied to your experimental work in New York? A. Well, to that and to our business generally.

Q. How long did you work experimentally in New York? A. Our experimental work in New York lasted approximately six months as an intensified proposition. It has been continuously followed up right along since then.

Q. From that time into what markets did you reach and by what methods? A. We took larger markets here (412) and there, in various parts of the country to test out the sectional differences, if any. We went to Baltimore and we went to Detroit especially I remember. We went to San Francisco, Denver and New Orleans. In fact we followed a picked system to get a line on the general situation in the United States, as far as we could in that way. We gradually filled in in the outlying dis-

tricts, or in the other markets as we were able to get to them.

Q. Did you use in this work, in other parts of the country the same methods that you have described as having been used by you in New York? A. Well, not exactly in all cases, although in principle, yes. In Detroit, for instance, we followed a campaign of circularizing through our agents Ben. B. Hampton & Company of New York. We got up a lot of attractive circulars, cards and letters. We used the newspapers extensively in Detroit, as an experiment which we had not generally dealt in in New York. We put on wagons, loaded the goods up which had been purchased from the retailer and put them right into the houses and sold them for cash and turned the cash over to the retailer. In other words, we used all the methods that we did not finally try in New York, so far as we could think of them.

Q. In your work in other parts of the country, did you begin as in New York, by developing a demand among the consumers? A. After our experience in New York (and our previous experience too) our main object in all cases was the ultimate consumer to start with, and only that the first effect of which was on the retailer and, in turn, on the jobber in time.

Q. Does that hold true in respect of your promotion work in all parts of the United States? A. Absolutely.

(413) Q. How many years were you occupied in extending from New York to other parts of the country? A. I might say that our general introductory campaign covering the United States lasted about eight or nine years.

Q. At the present time, how complete is your distribution of Old Dutch Cleanser throughout the United States? A. I should say thorough.

Whereupon by agreement of counsel for the respective parties hereto, the further hearing of said deposition was adjourned until 1:15 P. M. the same day, May 18th, 1917.

May 18th, 1917, 1:15 P. M.

Parties met pursuant to adjournment.

Counsel present same as before.

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Whereupon the examination of the said EMIL A. STRAUSS was continued as follows:

Mr. MONTAGUE: Q. On your plan of distribution of Old Dutch Cleanser throughout the United States, Mr. Strauss, what is the function of the distributing agent?

A. He takes care of the requirements of the retailer in his district, supplying him from his stock and making quick deliveries.

Q. What else does he do as a part of this plan? A. He supplies the retailer and gives him credit and calls on him through his salesman. He is a regular jobbing distributor and follows the regular distributing and jobbing method as applied to all of the goods that he is interested in and carries.

(414) Q. What is the function of your canvassers who canvas the retail trade? A. It is the province of our canvassers to educate the retail trade as to the advantages of Old Dutch Cleanser to the public and to the retailer; to advertise his goods in the store of the retailer that he calls on and to explain to him the advantage of selling Old Dutch Cleanser as against the other competitor's products and generally to promote and build up the business of Old Dutch Cleanser in the interest of a given retailer in this way.

Q. At what prices do the distributing agent's salesmen and your canvassers quote when they call on the retail trade? A. I do not know the prices that the distributing agents quote excepting that we have a list which we presume they follow and which our own salesmen invariably follow. The prices are \$3.40 in singles and up; 5-box lots, \$3.30 and 10-box lots, \$3.25; 25-box lots \$3.20, cost to the retailer, the terms being usually 60 days net, or two per cent off for cash, if paid within 10 days.

Q. What would be the consequence to your own plan if there was a difference between the price which the distributing agents' salesmen quoted, and the price your own canvassers quoted to the retail dealer? A. What would be the what?

Q. The consequence to your plan? A. To our marketing plan?

Q. Yes. A. Our plan would fail naturally if we did not have a uniform and equitable list to everybody. We have such a list and, if any of our own men, our own

canvassers or solicitors had quoted at one price and if we had other people who handled the goods at another (415) price, our canvassers could not maintain their position at all. They would lose caste. If they quoted a higher price, it would be useless to us and the retailer would not have any confidence in them if they could not sell as reasonably as anybody else could. Our main purpose, and the only purpose in having a price is to have our distribution uniform. We have really only one price, and that is the price to the general trade, to the retailer, and that price we aim to maintain. That is the only price we consider. We have not any other price in our business at all.

Q. How do you select distributing agents for Old Dutch Cleanser? A. Generally and practically exclusively from what is known as the wholesale trade, which comprises mainly wholesale grocers, wholesale druggists and also wholesale people in the notion line or any other line of business that supplies goods to the retail stores or that handles the products of grocers in any form; general stores in the country for instance. Our main distribution is through wholesale grocers and we select those wholesale grocers by taking those whom we know do a legitimate wholesale grocery business, that is, those who have no retail affiliations, who wholesale only and don't sell to the consumers directly as interfering with the established retail trade as such, and who have the facilities for such wholesale distribution, at least to a reasonable extent.

Q. How does the compensation which you allow your distributing agents compare with the jobbers' profit in the lines that you have just described? A. It is substantially on the same general basis as the soap trade generally allows the wholesaler or assumes to allow the wholesaler. In other words, it ranges in the soap trade generally, from about 10 to 15 per cent.

(416) Q. Why is it that your distributing agents are willing to sell Old Dutch Cleanser on the basis of your general price list? A. The wholesaler, the distributing agent, has, comparatively speaking, only fair remuneration. In our experience he has generally not been satisfied with it, but he has accepted it because it averages with the others and furthermore for the reason that he has not really got to sell the goods. It is not a forced trade proposition with him. He claims that his cost

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ranges about 10 per cent now-a-days, so that his margin of profit in any event is very small. But he is well satisfied to sell at our general sales list and to take the profit that we allow him as a minimum. He really wants more and would like to get more.

Q. But why is he willing to sell at that general list price? A. Well, mainly because that is the list that we sell at through our own men, and that we ask them to sell at, and we suggest it as a fair distributive price from his own stock and in his own business.

Q. Why does he find it good business for himself to sell at your general list price? Why does he find it what?

Q. Why does he find it good business? Is there anything peculiar about the demand for Old Dutch Cleanser that makes it profitable for him to sell it on that basis of compensation? A. Old Dutch Cleanser is almost essentially based on the consumer's demand so far as the jobber and the retailer are concerned and they only handle it practically as an incident of their business, at least that is true of the retailer in responding to the demand from the public, so that the jobber in his turn has only to fill a demand and has not got the actual forced (417) selling to do, so that his relative expense is perhaps a little less than it is on the aggregate of his general business, and consequently the margin of profit appeals to him from that standpoint. Furthermore it is a high-grade product. It stands well with him owing to the position that it holds with his customers and, in turn with the consumer. He likes that class of a product in his trade.

Q. What would become of your distribution and business in Old Dutch Cleanser if you did not have the plan that you have already described? A. As I see it, we would not have much business after a little time. It might be a year, it might have been three or four or five years, but it is from the fact that, whereas the distributing agent now feels satisfied to handle Old Dutch Cleanser and makes a living out of it, if we had no plan and did not try to protect the distributing agent, if his labors would sell it without our doing anything at all, at any old price, maybe cost or less, he would naturally say, "those goods cause me to lose money and I have my expense for nothing, and I won't handle them; I will buy something else; I will put my own brand out

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and get a profit out of it," as they do with a lot of specialties. We could not possibly expect co-operation with the general run of distributing agents unless we could reasonably say to them, "We will do all that we possibly and reasonably can to protect you against any unreasonable and unfair competition," and while we cannot say to such competitors that we will bring them before the law, and while we cannot punish them, at the same time we can say to them, "We would like to have your co-operation because everybody else buys at the same price and everything will be equitable and fair and just," (418) and we feel that whereas there may be some irregularities in our distribution here and there, that in the aggregate they will find it to their own best interests to sell at our given list and in that way we co-operative in getting to a fair degree at least, the relatively small margin of profit that we provide for them in our plan of distribution.

Q. From the experimental period in New York, which you have described, continuously down to the present time, have you used the methods which you have already described in the promotion and distribution and sale of Old Dutch Cleanser? A. That has been our purpose and aim continuously.

Mr. MONTAGUE: That is all.

CROSS EXAMINATION.

By Mr. SMITH:

Q. Mr. Strauss, are there not a number of articles that are sold by the wholesale and retail grocers that are not marketted under that plan that you have described?

A. Yes, sir.

Q. Are they successful? A. Some of them are, and some are not.

Q. Then it does not make any difference about the plan, as to whether they are successful or not? A. I would not say that.

Q. Why not? A. In the first place each product is essentially different and consequently in a class by itself. In the so-called specialty products, we classify Old Dutch Cleanser as a high-grade specialty and kindred products in themselves come into a class of their own.

Q. Don't you classify it as a staple article? A. Oh, no.

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Q. Is it not an article of general use? A. Yes.

(419) Q. Don't you think that a form of scouring compound is an article of ordinary staple use? A. I would not say "staple," I would say, "Specialized use."

Q. Can you give me any idea of how prevalent the use of scouring compound is throughout the United States? A. Do you make a distinction between a scouring compound in powdered form, in cans, and a scouring compound in brick form, such as Sapolio?

Q. Well, I will divide the question up, and you may answer first with respect to the powder form.

Mr. MONTAGUE: I object to all these questions on the ground that they are not proper cross examination.

The WITNESS: I could not any more than give a guess at it.

Mr. SMITH: Q. Could you with respect to the cake form? A. No.

Q. Can you say whether the use of the cake form is more prevalent than the powdered form? A. The cake form had the entire field up to the time—

Q. I am speaking of say now, and for instance, back in 1914. A. 1914? I should say that the powdered form has a bigger trade now and probably had a bigger trade in 1914 than the scouring brick.

Q. Now, the Old Dutch Cleanser comes under the head of a powdered form of scouring compound, does it not? A. Yes.

Q. Do you regard the cake form of scouring compound as a staple article? A. No, sir, specialty.

Q. What do you mean by a specialty, or a specialized article? A. It is an article that is sold under a brand, or on brand mainly.

Q. Isn't every soap and every scouring compound, whether in the form of cake or powder, sold under some (420) name? A. Yes, but the name in itself does not make a specialty product out of it. It is only when they are promoted under that name, as a high-grade specialty, a uniform product, that they become a high-grade specialty, or a highly specialized product.

Q. Then, unless the article is of high grade, it is not a specialty? A. I did not say that. I said that the product that is of high quality and is so promoted, as a

high-grade product to the public and is being sold and used and marketed by means of promotion and advertising and general distribution,—it does not become what we call a specialty. It might have a special name, but that does not make a specialty out of it.

Q. What does make a specialty out of it? A. The fact that the public is taught to know it for what it actually is; to call for it on account of their knowledge of it and something that they eventually expect to be able to get at almost any place, any store that they go to. I might give you some illustrations if you like of different lines.

Q. Go ahead. A. In the baking powder line, take Price's Baking Powder; in the soap line, Ivory Soap, Cream of Wheat. I could name you an indefinite number of articles that have been on the market for many, many years that are put out in what we call a specialized form.

Q. Then the article itself has nothing to do with it? A. To make it a specialty, no.

Q. The article itself may be a staple? A. And very often is.

Q. And those conditions that you have described in your answer make the article which itself is a specialty,—or which itself is a staple, into a specialty? A. Yes.

Q. Now, take the case of Spotless Cleanser. Would (421) you call that a staple or a specialty? A. I would not call it either right now, today. It is a new article; it is only known in a limited way. They are trying to make a specialty of it. That was our original situation.

Q. Has the manufacturer of Spotless Cleanser, with respect to that article, a system of price maintenance? A. I do not know.

Q. Can you answer with regard to the Babbitt Cleanser? A. As to the price policy, no.

Q. Would you call that a specialty? A. Babbitt's Cleanser, no.

Q. That is a staple, is it? A. I would put it in about the same class as I classify the Spotless Cleanser. It is being sold on the theory of building up a trade gradually and I suppose by and by they expect to specialize on it.

Q. Now, with respect to the selling plan, as I understand it, you widely advertised Old Dutch Cleanser? A. Yes.

Q. You then sent your men among the retail trade

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and placed advertising in the stores and incidentally sought to take orders from the retail dealers for Old Dutch Cleanser, is that correct? A. Yes, practically.

Q. Now, this representative of yours takes the order to whom? A. He takes it to the distributing agent.

Q. Doesn't he send it to New York? A. No, sir.

Q. For instance, from Baltimore? A. No.

Q. Now, I understood you to say that he takes it to the wholesaler, whom the retailer names in that territory? A. He does not himself go to the wholesaler necessarily, no.

Q. Who does? A. It depends on who the man is. Some man that is classified as a wholesaler may solicit it (422) or some man to whom the aggregate of the solicitors send their orders but either the wholesale solicitor or the division office receives it, from where the order is filled.

Q. And from the Baltimore territory where would that be? A. I think they would go to New York.

Q. What would New York do with the order? A. Mail it out.

Q. To whom? A. Either to the jobber or, if our general man goes along, he would deliver it to the wholesale man if he happened to be through that way.

Mr. MONTAGUE: Where the witness speaks of "the wholesale man,"—

The WITNESS: Our salesman or our solicitors.

Mr. SMITH: Q. Now, suppose that John Smith, a retail grocer in Baltimore,—suppose that he did designate Frey and Son as his wholesaler, with whom he did business during 1914 and 1915,— A. Yes.

Q. What would happen to that order?

Mr. MONTAGUE: I object to the question on the ground that it is entirely hypothetical.

The WITNESS: A. Our salesman would say that he was not in a position to accept the order through Frey.

Mr. SMITH: Q. Well, tell me this: in cases where, after Frey was cut off, one of your representatives called upon a retailer and the retailer designated Frey as the wholesaler, what was done to that order?

Mr. MONTAGUE: That is objected to on the ground

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that the question is hypothetical, and assumes a state of facts that has not been shown but that on the contrary (423) is the fact, and further on the ground that the question contains in its present form a conclusion and also that it is not proper cross examination.

(The question was then read.)

The WITNESS: A. The merchant would be told that the salesman or solicitor (canvasser in effect) could not accept an order through Frey and would not book or enter the order.

Mr. SMITH: Q. Does the Cudahy Packing Company sell to Frey & Sons, Old Dutch Cleanser?

Mr. MONTAGUE: That is objected to as not proper cross examination.

The WITNESS: A. Now? Do we sell him now?

Mr. SMITH: Q. Yes. A. We offer to sell him continuously.

Q. How is that? A. We have offered to sell him continuously.

Q. That is not the question, do you? A. He has never ordered.

Q. Since when have you not been selling to Frey Old Dutch Cleanser?

Mr. MONTAGUE: I object to this line of questions on the ground that it is not proper cross examination; on the further ground that the present question assumes a state of facts which has not been shown in evidence and which, in fact, is contrary to the facts.

The WITNESS: A. My recollection is since early in 1913. I am not sure that that is right; I think it is 1913, or 1914.

Mr. MONTAGUE: 1914, I think.

The WITNESS: May I look that up?

Mr. SMITH: I can tell you, it is early in 1914.

The WITNESS: May I correct that to read that way?

(424) Mr. SMITH: Oh, yes.

The WITNESS: I did not remember.

Q. Now, since that time, in cases where a retailer

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wanted to order some Old Dutch Cleanser and told your representative that his wholesaler was Frey & Son, what would happen to that order?

Mr. MONTAGUE: Objected to on the ground that it is not proper cross examination; that the question is entirely hypothetical and assumes a state of facts not proven.

Mr. SMITH: I will amend it. What happened to such an order?

Mr. MONTAGUE: That is objected to on the ground that it is not proper cross examination; that it is entirely hypothetical; that it assumes a state of facts not shown by the evidence and one which is really contrary to the facts.

Q. Do you personally know of any such instance? A. I do not know of a single such instance.

Mr. SMITH: Q. I understood you, Mr. Strauss, to tion, going to continue?

Mr. MONTAGUE: These objections are not covered by the stipulation, and are in addition to those specified in the stipulation.

Mr. SMITH: Can we not make some stipulation to cover this situation? You are subjecting me to a lot of interruptions that I agreed not to subject you to.

Mr. MONTAGUE: The ordinary objection that the question is incompetent, irrelevant and immaterial, does not apply to these questions. It applies together with a number of other objections. In other words, to fully protect myself I should have to state that these questions of yours are not competent, relevant or material and (425) that they are also hypothecated and not proper cross examination and assume a state of facts that is not shown in the evidence.

Mr. SMITH: Is it not incompetent we will say if it is not proper cross examination?

Mr. MONTAGUE: No, it is incompetent only in the event that the witness is not qualified to answer.

Mr. SMITH: Does it not come under the head of irrelevant, if it is improperly a hypothetical question?

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Mr. MONTAGUE: Not necessarily.

Mr. SMITH: Why not?

Mr. MONTAGUE: Well, I won't argue it.

Mr. SMITH: Q. Then I will ask you, in the usual course of the business of the defendant, what would be done with such an order?

Mr. MONTAGUE: That is objected to on the ground that it is hypothetical and not proper cross examination.

A. We have instructions to our representatives of every kind that, where a merchant named by a retailer is not a classified distributing agent, that the representative can only tell the retailer that he cannot accept that order and they are not authorized, in fact they are specifically prohibited from making any other suggestion or in any other way entertaining the order excepting to say, if the question is pressed by the retailer, that it is perfectly proper for the retailer to send that order direct to Frey.

Mr. SMITH: Q. Does not your representative suggest or say something to the retailer with regard to naming some other wholesaler in such a case? A. Not so (426) far as I understand it.

Q. Now, these distributing agents that you speak of, can you tell me whether practically all the wholesale grocers in Baltimore are distributing agents or what you call distributing agents of Old Dutch Cleanser? A. All the wholesale grocers?

Q. I say practically all? A. I think that in Baltimore the wholesalers, with maybe two or three exceptions have always,—that is, the exclusive wholesalers,—I don't know whether that covers the same ground that you understand by "wholesalers,"—but the general run of wholesale grocers are substantially distributing agents all over the United States, including Baltimore of course.

Q. Can you name anyone in Baltimore who is not what you call a distributing agent of Old Dutch Cleanser, that is, any wholesale grocer? A. I do not think of any right now. In fact I do not know by name,—as far as I can think of now,—any wholesalers in Baltimore, except one and that is Frey.

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Q. Is he a distributing agent? A. I don't think so. I said that a while ago; I think you asked that question.

Q. You said you don't think so? A. You asked the question a while ago, and I said, "No."

Q. I understand that you have other representatives of your Company calling upon the wholesale trade? Now, suppose a wholesaler gives one of those representatives an order, what would happen to it? A. Well, I know of one case,—

(Question read.)

A. If the wholesaler is a desirable connection of good credit standing, we accept and take care of the order subject to prices and the market conditions.

(427) Q. Now, is that true of every wholesale grocer in Baltimore? A. That is true of the trade generally including the wholesale grocers of Baltimore.

Q. Is it true of Frey & Son? A. Yes, I think so.

Q. At what prices do you sell to the wholesalers in Baltimore and the surrounding territory? A. We sell only at one price everywhere, and that is our general sales list price.

Q. Is that the price to Frey & Son? A. Yes, sir.

Q. Haven't you, as a matter of fact, on at least one occasion, since the early part of 1914, refused to sell to Frey & Son, at that wholesale price? A. I did not say that, I did not say wholesale price; I said general sales list price.

Q. Well, that is the retail price? A. We call the general sales list price,—that is what we call it. We only have that one price. We have no other price, either wholesale or retail.

Q. You don't mean to say that the retailer pays the same for Old Dutch Cleanser that the wholesaler does?

A. He does, so far as the list is concerned.

Q. I know, but let us brush aside for once the list and get down to the net price. It is true that the retailer pays a higher price than the wholesaler, isn't it?

A. Not as far as the list price is concerned.

Q. Let us take the net price, what does it cost him?

A. The general sales list price is the net price. There is a further compensation to our distributing agents, if you want me to make that point clear. That is the way the thing works.

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Q. The point I am making,—I don't want to make any particular point except this: I want to know whether (428) the retailer and the wholesaler pay the same price for Old Dutch Cleanser? A. Yes, they pay the same price as far as our list is concerned.

Q. Then the wholesaler selling to the retailer makes no profit on Old Dutch Cleanser? A. He makes no profit, so far as the list is concerned. He gets a special compensation.

Q. I am not talking about so far as the list is concerned; I am asking you the direct question as to whether the wholesaler makes any profit on the Old Dutch Cleanser that he sells to the retailer? A. Not unless he is on our distributing agent's list.

Q. Well, if he is on it, what then? A. Then he gets a compensation for his work.

Q. He gets a profit, does he? A. You can call it that, if you like.

Q. It goes in his pocket, doesn't it? A. It is his compensation.

Q. He gets it, doesn't he? A. Yes, I suppose he does.

Q. It is his? A. That is the reason we give it to him, for him to keep it.

Q. Now there is a difference in price therefore between what the wholesaler pays, and what the retailer pays for Old Dutch Cleanser? A. Well, that is correct, if you qualify it properly; if you call him a distributing agent, yes; but not if you call him a wholesaler, because as a wholesaler, he has only the one price to pay, but if he is a distributing agent, he gets the compensation.

Q. Well, call him a distributing agent then and tell me then whether what you call a distributing agent pays the same price for Old Dutch Cleanser that the retail grocer does. A. He gets an additional compensation (429) from the price that the retail grocer pays.

Q. And what you call compensation is his, isn't it? A. Certainly.

Q. That is his profit? A. That is his compensation. I want to explain to you that my stubbornness is because the proposition we are dealing with is a fact in our business. We have so classified our own affairs in what we believe to be a fair and practicable way within our own organization, as well as outside and I am trying to make the point clear that we do make a dis-

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tion, a distinct difference between the wholesale trade as such and the distributing agent as such.

Q. Now, when you sell the Old Dutch Cleanser to a wholesaler,—or as we will call him, a distributor,—and the goods are delivered to him, are they his goods? A. Yes.

Q. Can you, so far as you are concerned—Is he free, so far as your Company is concerned, to sell that Old Dutch Cleanser for any price he chooses to the retailer? A. We never try to influence him to do anything else. He understands that they are his goods and he is at liberty to do what he likes with them.

Q. Is it not a fact that your Company has on numerous occasions in the past, before and since the early part of 1914, sent out circulars to the wholesale trade in which they are told in effect that they must sell at a price, your list price that you have fixed, and that if they don't sell at that price to the retailer, you won't sell to them? A. We never sent out any circulars like that.

Q. I said, a circular. A. I said "circular."

Q. Did you, pardon me. I have trouble in hearing you. You do not speak very loud and I cannot get all of (420) of it. Now, I will ask you this: do you know whether under date of June 1st, 1915, the Cudahy Packing Company sent out to the distributing agents, a circular entitled "Distributing Agents' Compensation in the United States for Old Dutch Cleanser and other products listed herein"?

Mr. MONTAGUE: I object to that on the ground that the question relates to a period subsequent to the beginning of this suit, and also on the ground that it is not proper cross examination.

Mr. SMITH: Q. Will you answer that? A. I do not precisely remember that particular date, but that is the form of circular that we probably followed in our price lists at that time.

Q. Well, now, do you know whether in such circular there was this sentence: "We especially desire to point out that this remuneration to our Distributing Agents may not be given away by them wholly or in part to any class of trade either other jobbers, semi-jobbers, retailers or consumers."

Mr. MONTAGUE: The same objection.

Mr. SMITH: Q. Do you recognize that? A. I think that is the form we followed.

Q. Will you state whether similar circulars were sent out to the Distributing Agents prior to 1914? A. I do not remember.

Q. Does what I have read embody the selling policy of your Company and was that true prior to 1914?

Mr. MONTAGUE: Objected to on the ground that the question relates to a period before the transaction referred to in this suit.

A. I should say that in that form, it in no way represents our policy because it is a sentence picked out of (431) the complete scheme of our business promotion and the policy used as to the general and distributing trade.

Mr. SMITH: Q. Let me ask you this question: You said a few moments ago, that the wholesaler who bought Old Dutch Cleanser paid a smaller price for it than the retailer. Is that correct? A. Well, I said the Distributing Agent.

Q. Well, all right, let us call him the Distributing Agent. Is that true, the Distributing Agent? A. Yes.

Q. Now, under the selling policy of your Company, as it existed during the early part of 1914, and prior thereto, is any restraint put upon the wholesaler by your Company, or attempted to be put upon him by your Company, by which he is restrained from selling Old Dutch Cleanser for any price he chooses to the retailer? A. We have never in any way tried to enforce any price plan on the stock of any Distributing Agent, nor have we at any time sold him goods with any agreement or understanding,—agreement, I mean to say,—as to just what he had to sell them for.

Q. But under an understanding then? A. We have asked them to co-operate with us for a uniform price.

Q. And they do co-operate do they not? A. To some extent, yes, and to a certain extent no.

Q. And if they do not co-operate, you don't sell to them, isn't that true? A. No.

Q. Name somebody that does not co-operate, to

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whom you do sell at a wholesale price? A. Did you say at our own price?

Q. How is that? A. We sell at the only price we have.

Q. At the price your so-called Distributing Agents pay? A. At the general price they pay. We do not give (432) them a compensation, such as we give our Distributing Agents, of course, when one is not a Distributing Agent.

Q. Do you sell to anybody, as a matter of fact, any wholesale grocer, who, as a matter of fact, sells the Old Dutch Cleanser at a lower price than you expect it to be sold to the retailer? A. I presume we do occasionally.

Q. Who? A. I have not anybody in mind and that is the reason why I say I do not know. There may be price cutting going on continually, and we have no way of ascertaining it.

Q. Is this true: That a man who is once your Distributing Agent remains your Distributing Agent so long as his credit is satisfactory, and so long as he sells the Old Dutch Cleanser to the retail trade at the price that you have named? A. I would say that that question could not be answered by yes or no.

Q. Just answer it any way you wish to long as you answer the question. A. We have occasionally had differences with jobbers and often important ones and we have often had occasion to find a jobber here or there who did not follow our so-called price plan, but if it was a case of fair co-operation and perhaps nominally a difference in his own organization, or a defect there, we have always adjusted it by saying to him "We do not want to control your prices, and we do not want to tell you just what to do, but we do want to know that you are a friend of ours, that you appreciate our goods from the (433) standpoint of a highly specialized product and if you give us your fair co-operation and consistent recognition we are more than glad to deal with you right along and keep you on our Distributing Agent's list.

Q. In such cases, does that man usually go on selling at the same price? A. We have known of such cases as that.

Q. You have found them out afterwards? A. We have found out afterwards.

Q. You did not keep on selling him at the wholesale price, did you? A. I will explain that more satisfac-

torily, by saying that it is our purpose to keep on our list of Distributing Agents only those Distributors who give us their fair recognition and co-operation and beyond that, as to the little details, we never interfere with them.

Q. This friendly co-operation means to you the observance by him of that list price in his sales to the retailer? A. We publish a list and we ask our Distributing Agents to co-operate with us to maintain that list as a matter of uniformity of sales so as to enable us to keep on promoting our goods and naturally we do ask him to co-operate as to that price as it is the only price we have got. If he cuts that price, and demoralizes our business in any section of the country or over the entire United States, he is seriously and materially damaging our interests. Under those circumstances naturally we talk to him and ask him to keep that price and give us his co-operation.

Q. And if he maintains the price in that way and (434) co-operates with you, you continue to sell to him.

A. If he co-operates in the price,—the co-operation and the price naturally to a certain extent go hand in hand but they are not the only issue in every case.

Q. Well, of course there might be other reasons; perhaps occasionally a man's credit would be such that you would not want to continue selling him? A. That and other reasons. For instance, we have occasionally a jobber who is naturally combative or for some other reason, is undesirable. We have those cases, people who give us no trouble otherwise.

Q. Why did you stop selling Frey & Son at the wholesale price? A. My recollection of the Frey case is that it is not altogether a question of price. I am sorry to say, but I have this recollection: that Frey for many years past had always been the cause of aggravation to us. He is a man that I consider in my position, in handling this sort of business, as a very undesirable customer.

Q. For what reason? A. Well, now, going back previous to the present, I know that I have always had in mind that Frey has been, as far as we are concerned, unreliable; meaning that the nature of his business, the way he resold the goods, his conduct in that regard, was of such a nature that it caused us a great deal of annoyance. I understand that at one time, Frey would go

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out and pick up ~~goods~~ from others. I believe that at one time he picked ~~up~~ some fire goods.

Q. You mean Old Dutch Cleanser? A. Yes, some (435) fire goods.

Q. Do you know this of your own personal knowledge? A. Well, as I say, that is in my mind. I am not positive that it is a fact.

Q. Perhaps you should not state it unless you are. A. Yes, that is right. But, anyway there are a lot of little cases that have come up in the past that have made a lot of sentiment on our part towards Frey and that have been the cause of embarrassment and lack of co-operation between us.

Q. How long did that continue? A. I remember that when we first put our goods on the market I went down to Baltimore myself and interviewed a man there, I don't remember whether it was Frey or not, and I received a very short and unfriendly reception.

Q. What year was that? A. That was in 1906 I think.

Q. When he first began to deal in it, or before that? A. I think it was before that.

Q. Was that your only experience? A. Yes.

Q. But after that, and despite that you proceeded to deal with Frey? A. Yes, we dealt with Frey because Frey had applied to us and we sold to him like we would sell to anybody under the same business conditions. We asked him for his good will and co-operation, and we counted on it, took it for granted that we would have it.

Q. How long did you have it? A. I don't think we had it more than ten minutes at a time.

(436) Q. And yet you continued to sell to him for a matter of a couple of years? A. We tried our best to get on with Frey and to extend to him the courteous consideration that we extend to the wholesale trade.

Q. What would you say with respect to the volume of sales by Frey relative to other wholesale grocers in Baltimore, during the time that he was buying Old Dutch Cleanser from you? A. Well, I don't remember the exact distribution. He had a fair distribution.

Q. There are plenty I judge in the City who were then on your Distributing Agents' list and still are, who sell less, isn't that true? A. Oh, yes.

Q. Considerably less? A. Yes.

Q. Now, did Frey pay his bills all right? A. So far as I know.

Q. You had some trouble with him I believe on the point that he would sell your Old Dutch Cleanser for less than the list price, is that true? A. We knew he was selling it for a materially cut price.

Q. For what? A. Materially cut price from the list.

Q. Was that prior to the time he was cut off? A. Yes.

Q. And that was the reason you cut him off? A. One of the reasons.

Q. Is there any other reason? A. Yes.

Q. What other reason? A. We never felt very (437) friendly to Frey, because of the way he treated our business.

Q. What you are referring to is the fact that he cut the price, isn't it? A. In part.

Q. Well, what other part? A. The general conditions existing between us.

Q. Those conditions arose, didn't they from price differences? A. No.

Q. What did they arise from? A. General business conditions; the conditions under which he bought the goods from other jobbers or from anybody that he could pick up something from.

Q. Did you have any objection to his buying from other jobbers? A. Oh, no.

Q. Well, why should that make any difference? A. Because we made him a price, made him conditions and stated terms that were more attractive than he could get from other people.

Q. You wanted in other words, to prevent Frey from losing money? A. We wanted to keep control of our own affairs, and our own goods and wanted to know how they were distributed as we were spending millions of dollars on the distributing of those goods.

Q. So far as you are concerned, the goods you sold to Frey were his goods after he bought them, were they not? A. Yes, and we never tried to stop him from doing anything he liked with them.

Q. What have you been saying refers to the fact (438) that after Frey bought the goods he would sell them to the retailer or perhaps to another jobber at less than the price you wished him to sell them at, is that correct? A. At which we asked him to sell.

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Q. Well, you wished it also, didn't you? A. Yes.

Q. There is no doubt about that, is there? A. No doubt about that.

Q. And that was your trouble? A. In part.

Q. As a matter of fact, didn't all of the friction (if I may put it that way) between Frey and the Cudahy Packing Company, exist relative to the fact that he did not, in re-selling the Old Dutch Cleanser, maintain the price you wished him to maintain and in the fact that he bought or sold the Old Dutch Cleanser to other jobbers? A. Certainly not.

Q. Well, now, what else entered into it? A. The fact is that since that time of his refusing to co-operate with us on price and maintain our prices, we have given him—

Q. (Interrupting) That was after you had cut him off? A. Yes.

A. I am speaking of the time when he was buying from you. A. As I explained to you, I cannot exactly remember all the details which led up to our sentiment (439) about Frey; but we always had the feeling that Frey was not a desirable connection, that he had treated us shabbily in a number of instances that occurred in the current business of the Company for years past, in fact dating back to the time that we originally introduced it, incidents that arose in our transactions from the time we came in connection with Frey.

Q. You cannot remember a single instance, however, that has not got something about that price maintenance plan in it? A. Oh, yes, I can.

Q. Well, name them. A. I am telling you of cases where he was very unfriendly to me.

Q. That was after you cut him off? A. No, no, it continued right along.

Q. I am speaking of after you began to sell to him.

A. That is the time I am talking about.

Q. But you only saw him once. A. I only saw him once, but our men saw him continuously.

Q. You were the man that cut him off? A. I acted on our general reports.

Q. Have you got those general reports? A. No, I don't know that I have. We do not keep that kind of records more than a year or two.

Q. Tell me if those general reports have to do directly, or indirectly with your price maintenance plan?

A. They had a good deal to do with it, but that is not the exclusive reason. If our differences with Frey had (440) been based only on that one point, I suppose we could readily have worked it out, but that was not the only thing and the evidence to that effect—

Q. Now, name something besides that had something to do with it. A. Offhand I cannot do that. Those little details in themselves would not be clear in my mind, unless I had the records about those facts.

Q. And yet you think you know enough about it to make that positive statement? A. Oh, yes, I make that positively.

Q. But you cannot name a single instance? A. A single instance outside of the price?

Q. That is what I mean. A. Well, I cannot name a single instance, but I tell you that it has been a continuous performance for many years on his part that led up to that feeling.

Q. You only sold to him for two years, didn't you? A. I do not know that.

Q. You do not even know that? A. Oh, we sold to him for more than two years, didn't we?

Q. I think it was two years and a fraction. Two or three years, let us call it that. A. Baltimore has been an active market for us at least since 1907 and up to 1914, that is seven years and I imagine that Frey stayed with us for seven years.

Q. Was he taken on as a Distributing Agent before or after the other wholesalers or any other wholesaler in (441) Baltimore? A. I am pretty confident that he was taken on when we first started; he started in buying and was on our Distributing Agents' list about 1907. I should say.

Q. Is there any other wholesale grocer in the City of Baltimore to whom you were selling Old Dutch Cleanser at the time you were selling to Frey & Son, who is not selling Old Dutch Cleanser now? A. I do not know.

Q. Is there any wholesale grocer in Baltimore to whom you are selling Old Dutch Cleanser, or to whom you sold Old Dutch Cleanser in the early part of 1914, and subsequently, who fails to sell at your list price? A. I don't think so.

Q. Now, this compensation that you refer to, amounts to how much a case? What you call your Distributing Agents' compensation? A. It is a varying

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compensation. It varies from forty cents a case on single-box lots to twenty cents a case in 25-box lots, plus quantity discounts.

Q. And that represents the profit of your wholesalers in Baltimore, between what they pay you for the goods, and what they get from the retailer, is that true?

A. It represents the compensation that we allow our Distributing Agents.

Q. Now, did I understand you to say that it made no difference to your Company, and it never had, what price the retailer charged the public? A. Charged the public?

(442) Q. Yes, for Old Dutch Cleanser. A. I do not know that I said it just that way. I said, as I remember it, that we advertised and aimed to have the goods sold at ten cents a can; that the price was cut below that and that three for a quarter was probably a popular price amongst the bigger stores in the larger cities. We have never aimed to influence the retailers price to the consumer.

Q. I want to ask you this with regard to the Read Drug and Chemical Company, which is operated by people by the name of Nattans in Baltimore. They are retail druggists. Is it not a fact that your Company stopped selling to them, because they sold to the consumer at less than the list price? A. I have never heard the names that you have just given, but I am positive that we never stopped selling them on account of the price at which they sold to the consumer.

Q. Now, I want to ask you this question: You have testified concerning the reason for your selling plan, and you stated that you had in view the consumer with respect to the wholesaler and retailer, and that that was your object in adopting the plan. I want to ask you if your object was not make money for the Cudahy Packing Company? A. Well, offhand I should figure that we, as a commercial house and like any other commercial house, were in business for a profit and natural- (443) ly we had the profit in mind in doing the business.

Q. Is it not your object under the plan of price maintenance to subserve your own profit?

Mr. MONTAGUE: That is objected to on the ground that it does not appear that we are engaged in a plan

of price maintenance and it assumes a state of facts which has not been shown.

A. Why, it is our plan to make a fair profit by the specializing that we are doing with Old Dutch Cleanser and the modes of distribution that we follow to reach the market.

MR. SMITH: Q. Isn't is your prime motive,—the prime motive for your selling plan, to subserve the interests and profits of the Cudahy Packing Company? A. Well, I should answer in this way to that; that anything we do, or I do, or the Company does, has got the eventual object of the business and the profit.

Q. That is the real end, isn't it? A. Of any business, I should answer yes.

Q. I should too. A. I don't see any other way to answer that.

Q. Except that I must have misunderstood the effect of something you said before, because I gained the impression that you had the interests of the consumer more at heart? A. May I explain that to you?

Q. Oh, yes. A. In marketing Old Dutch Cleanser originally, we had in view the building up of the business (444) ness, and we had to figure out how we could most effectively build up a business and a profit to ourselves in that business in the end. Our experience had proven to us that we could not expect any support from either the wholesaler or the retailer; that it was a case distinctly between ourselves and the ultimate consumer. We did not consider either the jobber or the retailer. Those are middle men whom we had to take care of, as middlemen only. So we fixed a price based on our cost, at which we eventually had to sell to the consumer and we said that that should be ten cents a can. We could not sell the consumer direct at ten cents a can, that is self-evident, so we had to go first of all to the retailer, and give him a profit and we knew that the retailers' profit was contingent upon our creating a demand so that the goods would move from his shelves if we did sell them to him. Then we went to the jobber and did the same thing with the jobber and we took from him,—what we call our Distributing agents,—we arranged a basis that was equitable and fair for the carrying on of our business. But we had always had in mind not the retailer

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or the wholesaler; they are just as selfish as we are, they want to get all they can all the time,—but we had in mind the consumer and by advertising and creating a demand on the part of the consumer, we subsequently got the good will and support of both the wholesale and the retail trade on account of the profit they got. Of course (445) we are in the business as a profit making proposition.

Q. If you could have hit upon some other plan, which would pay you the profit which you expect, a less expensive plan, you would have adopted it, wouldn't you?

Mr. MONTAGUE: That is objected to as merely hypothetical.

A. I do not hesitate to say that if we thought there was a plan that would come within any degree of beating the present plan, we would adopt it in a minute.

Mr. SMITH: For your own benefit? A. For our own benefit, as long as it was decent and legitimate.

Q. And it would not matter about the public, would it? A. We have always got to take the public into account.

Q. What I mean to say is this—

Mr. MONTAGUE: Let him finish his answer.

Mr. SMITH: He does not understand me.

Mr. MONTAGUE: He understands you all right.

Mr. SMITH: He cannot put in an answer that is not responsive.

The WITNESS: Our whole business is predicated on the consumers following. We cannot have any business if we have not got the recognition of the consumer. As a consequence, if we want to make a profit, we must first get and continuously maintain the interest of, and satisfy the consumer, and hold him as a continuing consumer. (446) We have no other interest except as between ourselves and the consumer.

Q. And your object there in holding the consumer is for the interest of the Cudahy Packing Company, isn't it? A. Yes.

Q. I want to ask you why you could not just as well adopt the plan pursued by the Spotless Cleanser people and put your product out to the consumer at five cents a

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can? A. Do you want me to discuss the value of Spotless Cleanser as against our product?

Q. I want you to answer that question. A. I am absolutely not in the habit of talking against anybody that is in competition with us or any of our products, but if you want me to enlarge upon the differences between Old Dutch Cleanser and Spotless Cleanser, I will be very glad to do it, if that is necessary in our present proceeding. You want me to do that?

Q. It is necessary to do that in order to answer the question? A. Oh, absolutely.

Q. Well, then, go ahead. A. Old Dutch Cleanser is a trade marked article, and it is produced on a secret formulae. We use in our product mainly a mineral and we control large tracts of land in which we have very large investments and on which we continuously spend a great deal of money in investigation and inspection. We have spent a lot of time and money on that. The product, as we now get it is secured after a great deal of investigation, and we do not believe that there is (447) another product in the field that in any way compares with it in basic merit. Ours is a volcanic ash as it is called geologically, also known as "American pumice" and that occurs in a variety of grades of fineness especially, as well as variety of quality, but the fineness more especially. Ours is particularly fine in its natural state and may be passed through a 120 mesh to the inch sieve without being ground or treated at all. It is essentially different from any other mineral that is used in scouring because it is flat or of a flat nature and under the microscope looks like, in its particles, a fine piece of broken glass, very, very small of course, and very fine and its scouring properties are vastly greater and vastly better than even the Italian pumice, which is made from rock but next to our product, the Italian pumice is the best. Next to that we have nothing substantial to contend with for while a strong chemical will clean a surface as well as something else, at the same time its use will in most cases result in taking the surface off in the process of cleaning, which is not the case with Old Dutch Cleanser.

Q. Is it the case with Babbitt's Cleanser? A. I am talking about Old Dutch Cleanser now.

Q. And I am asking you if that is the case with Babbitt's Cleanser? A. You have asked me for two

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things and I am answering you. Spotless Cleanser has (448) been put on the market very recently, and from our examination of the samples that we have received, we do not consider it in any way equal in merit to Old Dutch Cleanser. We believe that the cost at which it is produced is vastly less than our cost. We do not know, of course, but they are selling it for a nickel and we are getting a dime, and it must be the difference in the quality that partially accounts for the demand.

Q. Has not the advertising got something to do with it? A. You mean with the cost?

Q. Yes. A. Advertising enters into the cost of everything to the extent of the advertising.

Q. How much per can does the advertising enter into the cost of Old Dutch Cleanser? A. I hardly think I will give that information away, unless we are compelled to give it away. I would not like to state that. I have never given it out for publication.

Q. Well, now, that is the question that I ask you!

MR. MONTAGUE: It is not proper.

MR. SMITH: It is perfectly proper, and it has been covered in all your own testimony, with respect to the elements that enter into your whole scheme. The advertising was referred to specifically.

MR. MONTAGUE: I object to the question as not proper cross examination.

MR. SMITH: You can answer it, Mr. Strauss.

THE WITNESS: A. I have said that it is information (449) that we have never given out and we do not want to give it out if we are not compelled to.

MR. SMITH: You must answer the question.

THE WITNESS: Haven't I answered it?

MR. SMITH: No, sir.

THE WITNESS: Well, to what extent am I obliged to answer the question? I am allowed to ask my attorney there, am I not?

MR. SMITH: Absolutely.

THE WITNESS: How about that, Mr. Montague?

MR. MONTAGUE: You are not obliged to answer.

MR. SMITH: If the witness does not answer that question, I am going to object to the use of any of this deposition on your part.

MR. MONTAGUE: Well, your record is made.

MR. SMITH: Over all of my objections, the witness

has been permitted to answer any question you asked him.

Mr. MONTAGUE: And over all my objections he has answered your questions.

Mr. SMITH: Will you answer the question?

The WITNESS: I would rather not.

Q. You refuse? A. Under the advice of counsel.

Q. How much money does the Cudahy Packing Company spend per year in advertising Old Dutch Cleanser?

Mr. MONTAGUE: The same objection.

Mr. SMITH: What do you mean?

(450) The WITNESS: The same answer.

Q. Do you refuse to answer? A. Yes.

Q. How much money a year during the year 1913, did the Cudahy Packing Company spend in advertising Old Dutch Cleanser?

Mr. MONTAGUE: The same objection.

Mr. SMITH: Q. Do you refuse to answer that? A. Yes.

Q. And the same question with respect to the year 1914?

Mr. MONTAGUE: The same objection.

Mr. SMITH: Q. You refuse to answer? A. Yes.

Q. And the same with respect to the year 1915?

Mr. MONTAGUE: The same objection.

Mr. SMITH: Q. You refuse to answer? A. Yes.

Q. How many cans of Old Dutch Cleanser were marketed by the Cudahy Packing Company, during the year 1913?

Mr. MONTAGUE: The same objection.

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Mr. SMITH: What is the same objection? Do you mean that he refuses to answer?

Mr. MONTAGUE: I object on the ground that it is not proper cross examination, and also on all the grounds mentioned in our stipulation.

Mr. SMITH: Is the witness going to answer the question, that is the point?

(451) Mr. MONTAGUE: The witness may state, if he chooses, that, on the advice of counsel he declines to answer.

The WITNESS: Would it be proper for us to put in there—

Mr. MONTAGUE: Will you let me ask him a few questions for the purpose of developing the ground of the objection?

Mr. SMITH: Mr. Montague, you can wait until your time comes.

The WITNESS: Would it be proper to state in this case, in answer to the question that we have always considered that as confidential in our business, that we have never given it out and have no desire to give it out.

Mr. MONTAGUE: It certainly is proper and that was the purpose of my question that I wished to ask, and that counsel just refused to let me ask. I suggest that you make any further explanation that you wish.

The WITNESS: I was asking in order to see how far I was authorized to go in answer to your question, and I would like to say that such is the fact, in other words, that information as to our business and its expenditures, has always been considered by us as strictly confidential, and is not given out even among our own organization, for business reasons and as being best from every standpoint.

Mr. SMITH: Q. Now, Mr. Strauss, do you refuse to answer the question? A. Yes, sir, for that reason.

Q. Now, I ask you the same question with reference (452) to the year 1914. A. Under the same conditions, I am not going to answer that question for the same reason.

Q. And now the same question repeated with respect to the year 1915? A. And the same answer.

Q. Now please state the amount of Old Dutch Clean-

ser sold by the Cudahy Packing Company, in dollars and cents during the year 1913?

Mr. MONTAGUE: The same objection.

A. The answer is the same, because the question covers the same ground.

Mr. SMITH: If I asked you with respect to the years 1914 and 1915, you would also refuse to answer?

Mr. MONTAGUE: The same objection.

A. The same answer.

Mr. SMITH: Q. I say, you would refuse to answer?
A. Yes, sir.

Mr. MONTAGUE: Now, will you permit me to ask him something?

Mr. SMITH: I do not think that I interrupted you in your examination of the witness. I allowed you to finish and I took up my cross examination in the regular order.

Q. Now, I want to ask you whether the Spotless Cleanser people advertise their product? A. I think they do. I have seen some of their advertisements recently.

Q. Is it the same sized can or the same amount of contents that the Old Dutch Cleanser is? A. Well, I think it is a little bit smaller can, somewhat smaller can.
(453) Q. How much? A. I do not know exactly.

Q. How much difference in ounces or pounds? A. I do not know.

Q. Then you really don't know about that, do you? A. I just know that it is a little smaller can.

Q. But with respect to the weight of the contents, you do not know? A. No, not exactly.

Q. Now, let me ask you with respect to the Babbitt Cleanser, whether, if as you stated, they did not market their product on the plan that you used?

Mr. MONTAGUE: May I interrupt? Are you finished?

Mr. SMITH: I will withdraw that part and start over again.

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MR. MONTAGUE: I call counsel's attention to his statement that in the event that the witness did not answer the preceding questions, he would not permit any of his testimony to be used in evidence. I ask, therefore, that his continued examination be considered as a waiver.

MR. SMITH: I repeat at this point what I said before, which is not what you have just said.

MR. MONTAGUE: I shall treat the further examination, by counsel for the plaintiff, of this witness, of a waiver of his statement made a moment ago.

MR. SMITH: It was not my object to have the question (454) decided by anyone present because there is not anyone present competent to decide it. The question will have to go up to Judge Rose, for his decision on that subject, as to whether this deposition can be properly used in evidence in the case, in face of the fact that the witness has refused to answer the questions I have put to him.

MR. MONTAGUE: I submit,—and I put it in for the purpose of the record,—that counsel, having made it known that he would now move to suppress the entire deposition because of things which have already occurred, it is highly improper and unwarranted for him now to go on and ask questions of the witness, having already stated that he is going to move to suppress whatever testimony this witness may have given here. I object to his abusing the process of the Court if he is going to proceed to persist in his effort to suppress this whole deposition.

MR. SMITH: Judge Rose is in Baltimore, and we are in Chicago. All the way through the deposition you have objected to questions and I have objected to questions. The questions go in and the answers go in just the same, because Judge Rose is not here to pass upon them and that must necessarily be the case. That is analogous to the present point that you are raising.

MR. MONTAGUE: Unless you withdraw your statement, that you will move to suppress the deposition, on account of the failure of the witness to answer certain questions heretofore asked, which he refused to answer, I will not object to any further examination by you of (455) this witness or the putting to him of any questions by you whatever.

MR. SMITH: Nevertheless I will proceed to question

the witness, and I do not concede that anything you say has any binding force upon my action in doing so.

MR. MONTAGUE: I will make the same objection, which I have just indicated to each question which you will now or hereafter ask during the taking of this deposition.

MR. SMITH: Q. I understood you, Mr. Strauss, to say that the Babbitt Cleanser is not marketed upon the plan of the Cudahy Packing Company. Is that correct?

A. Do you want me to go on? I do not know their plan.

Q. You do not? A. I do not know anything about their marketing plan.

Q. In cases where the wholesale grocer gives one of your representatives an order for Old Dutch Cleanser, what is done with that order, and how is it filled with respect to the City of Baltimore, or with respect to the grocers in the City of Baltimore? A. Do you mean the wholesalers, or the retailers?

Q. The wholesalers? A. Meaning wholesalers in the general understanding of the term, or distributing agents for Old Dutch Cleanser, according to our understanding?

Q. I said, a wholesale grocer who gives one of your (456) representatives an order. Would anybody but what you call a Distributing Agent come in that category? A. Yes, indeed.

Q. Suppose there was one that was not a Distributing Agent, what would happen to the order? A. Frey, for instance?

Q. I am not talking about Frey. Suppose one, who was not on your list of Distributing Agents should give one of your representatives an order? A. I can best illustrate that by stating the case of Frey, who did give orders and we would be glad to accept them, and we have done so, in the last three or four years repeatedly.

Q. Since you stopped selling to him? A. Certainly.

Q. You say you have sold to him? A. We offered to sell to him.

Q. At the price that the retailer pays? A. You spoke about wholesalers, and I tried to explain to you, that we would fill anybody's orders.

Q. Suppose a wholesale grocer in the City of Baltimore, who is not in your Distributing Agent's list, should give one of your representatives an order for Old Dutch Cleanser at the current price to the wholesaler. What

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would happen to that order? A. If the wholesaler was on our distributing agent's list,—

(457) Q. I say, one who was not on it? A. Who was not on it? A wholesaler who is not on our Distributing Agents' list, if he wanted to give our representative an order, we would quote him our general sales list price and accept the order on those terms.

Q. And the general sales list price is the price that the retailer pays to the wholesale grocer, is that correct? A. The general sales list price is the price at which we sell everybody who is not a distributing agent.

Q. Will you please answer that question? That is very plain, as to whether that is not the price that the retailer pays for the goods to the wholesaler? A. I really thought I had answered it by stating that any merchant could buy it at that price, any merchant, wholesale or retail, a hardware store or anybody else.

Q. Now, with respect to an order given to one of your representatives by a wholesale grocer in Baltimore, who is on the Distributing Agent's list, what would happen to that order, how would it be filled? A. It would be filled in accordance with our published list and subject to the compensation which we allow. Do you refer to the office routine? How it is filled, how the order is taken care of?

Q. Yes. A. In Baltimore?

Q. Yes. A. The order would be sent to New York (458) where we have a division office and would from there be filled from our stock, either in New York or Baltimore, the latter most likely if we happened to have the goods there at that time.

Q. You usually carry a stock in Baltimore, do you not? A. We warehouse goods there, we aim to keep a stock there right along.

Q. It is only in exceptional instances when it runs out? A. Yes, it is in exceptional instances that it runs out. We try to keep a stock in a warehouse, but that is more or less a matter of opportunity. Sometimes we cannot get the room, and sometimes we have not got the stock to ship, we are short. When we take it away from a place like Baltimore,—then we take it away from our Distributing Headquarters. Usually we carry a stock in all the important cities including Baltimore.

Q. I understood you to say that in the beginning, when you started your activities throughout New York

City, that it was impossible to reach the jobbing and the retail trade in any way, except by the method which you adopted for marketing your goods. Is that correct? A. Substantially, yes.

Q. Now, I understood you also to say, that the Spotless Cleanser people do not adopt that method? A. I did not say that.

Q. Didn't you say that? A. No.

(459) Q. Didn't you say that the Spotless Cleanser people did not have a fixed price by which the goods were sold by the wholesaler to the retailer? A. I knew nothing about their marketing, or price policy, and never heard of it. If I did say it and forgot it, it is a misunderstanding somewhere, because I know nothing whatever about it.

Q. Tell me whether the Cudahy Packing Company makes a profit on Old Dutch Cleanser? A. We have made a profit on it.

Q. Did you make a profit on it in 1912? A. Yes.

Q. How much?

MR. MONTAGUE: That is objected to on the ground that is not proper cross examination, and all the other grounds mentioned in our stipulation.

THE WITNESS: That is inside information that is our own business and that we never give out or permit to be publicly developed.

MR. SMITH: Q. And you refuse to develope it in this proceeding? A. Yes.

Q. I ask you the same question, respecting the profits of your Company, on Old Dutch Cleanser during the year 1913?

MR. MONTAGUE: The same objection.

MR. SMITH: And the witness refuses to answer that, (460) is that right? A. Yes, sir.

Q. The same question with respect to the year 1914?

MR. MONTAGUE: The same objection.

THE WITNESS: A. The same answer, following Mr Montague's position.

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Mr. SMITH: Q. And the same question with respect to the year 1915?

Mr. MONTAGUE: The same objection.

A. The same answer.

Mr. SMITH: Q. And the same with respect to the year 1916?

Mr. MONTAGUE: The same objection.

A. The same answer.

Mr. SMITH: Q. And the same question with respect to the year, so much of it as has gone by, of 1917?

Mr. MONTAGUE: The same objection.

A. The same answer.

Mr. SMITH: Q. I understood you to say that in formulating your plan for marketing your goods, that it was necessary to advertise extensively, is that true? A. Yes.

Q. And that was true in order to interest the consumer who would in turn make a demand upon the retailer, who in turn would make a demand on the wholesaler, is that true? A. I should just like to supplement (461) your word "advertising", by the word "promoting." Our plan was not alone the advertising, the advertising was incidental to the plan.

Q. Was not the promoting mainly advertising? A. No, that depends on what you call advertising.

Q. I will put it in this way. I understand that you advertised in the newspapers, in the magazines, on billboards, by putting displays in the retail grocers' windows, and in his store, by calling upon the housewife, and exhibiting your wares and talking the merits of it up to her. Is that true? A. Yes.

Q. That is what you call promotion? A. Yes, and it includes, of course, soliciting and everything else like that.

Q. Now, then, your business, I presume, has increased wonderfully? A. It has been increasing.

Q. How is that? A. It has increased. The word "wonderful,"--

Q. Is relative, isn't it? A. It is quite large.

Q. Can you give me an idea of the proportionate increase from the year 1912, to the year 1913, and from the year 1913, to the year 1914, and from 1914 to 1915?

Mr. MONTAGUE: Objected to on the ground that it is not proper cross examination.

Mr. SMITH: Q. Will you please answer the question? A. (We have always treated that information as strict- (462) confidential, and we have never given it out, and naturally I won't answer that question, under the advice of counsel. May I say this--

Mr. SMITH: (Alluding to the fact that witness and counsel for defendant conferred briefly.) This is also advice of counsel I should judge, from the whispered conversation?

The WITNESS: I do not think you will find any fault with what we said, for I am trying to help you out. I would like to say that in the years that you named, our business in Old Dutch Cleanser, has shown a continued increase from year to year, owing to our continued heavy promotion and advertising and general work on the product.

Q. Will you state what that increase has been in percentage for anyone of the years that I have mentioned?

Mr. MONTAGUE: The same objection.

A. I do not remember the exact figures, but it has been less than 10 per cent in every year.

Mr. SMITH: Q. So that in approximately 11 or 12 years, the business has doubled itself?

Mr. MONTAGUE: The same objection.

A. That would be the case if you used my outside figure, but in one or two of the years the percentage of increase was a whole lot less than half of that.

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Q. And some years more, I judge? A. No, I said not more than 10 per cent in no case more than that.

(463) Q. Well, of course the business started off about 10 or 11 years ago, with nothing, and it has now grown to quite a considerable business? A. We have a very fair business.

Q. Now, despite the fact that your business has grown up to the point where it is, as you term it, a very fair business, you still find it necessary to advertise?

A. We have been advertising continuously, and our advertising has been proportionate to our past record. We have increased our advertising somewhat every year so that it is substantially greater today than it was five years ago. We want to get the product so that children will cry for it. We have not got there yet, so we have to keep on advertising.

Q. So that the conditions that you described with respect to your beginning in New York with Old Dutch Cleanser, that is, to the effect that you needed to advertise in order to get the grocers interested in the article, that is not true today, is it? A. We never have advertised to get the grocers interested.

Q. Didn't I understand you to say in the earlier part of your examination in chief, something to this effect; that you could not interest the wholesale grocers, or the retail grocers in Old Dutch Cleanser, and that therefore you adopted a plan involving the promotion work that you have described? A. The facts that I tried to convey (464) were that Old Dutch Cleanser being an entirely different and new product at the time, that is, in the form in which it was put up (in cans) we knew that we could not market the goods to either the wholesaler or the retailer, without appealing to the consumer; that the retailer and the jobber would not do the work for us. We knew that, we had proved that by our experience before, and we knew that we must create a demand on the part of the consumer. That we resorted to advertising was because it was essential to get the following of the consumer. We do not really today feel that we are any more interested in the retailer or wholesaler, than to the extent of their good-will on account of the demand that comes to them and the advertising is merely incidental in the development work that we are continually doing, it being our main object to build up the product and the demand for it on the part of the consumer.

Q. Who pays for this advertising of the Old Dutch Cleanser? A. The Cudahy Packing Company.

Q. Who ultimately pays for it?

Mr. MONTAGUE: That is objected to.

A. The Cudahy Packing Company.

Mr. SMITH: Q. Does it or does it not enter into the price that you charge for the goods? A. It enters into it nominally.

Q. It enters into it to the extent of the cost of the (465) advertising, doesn't it? A. Not necessarily.

Q. What do you mean by not necessarily? A. I do not figure that it is costing so much to advertise and we are charging so much on account of it.

Q. You make a profit on the Old Dutch Cleanser,— A. And the advertising comes out of our profit.

Q. You mean, your profit is that much less at ten cents a can to the consumer? A. That is the same thing, only using different phraseology.

Q. But there is a profit over and above the advertising? A. I hone so.

Q. It is your profit? A. Today I do not know; it may be a loss today.

Q. How about the year 1916? A. In 1916 the prices were very much lower than they are today and I think we made a little profit that year, above the advertising.

Q. That is true of 1914, 1913, and 1912, isn't it? A. Naturally.

Q. Now, to refer to a subject that I overlooked a moment back, I presume that the Spotless Cleanser is a secret formula, too, isn't it? A. I do not know the first thing about it.

(466) Q. Well, you were talking about it and comparing the ingredients and so forth of the two? A. I told you something of the differences.

Q. You do not know whether it is a secret formula? A. Certainly not.

Q. It is put up under a trade name? A. "Spotless" as you said.

Q. Just the same as the Cudahy product? A. Just the same as Old Dutch.

Q. Just the same as Old Dutch Cleanser? A. As far as that feature of it is concerned, yes.

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Q. Now, answer me this: Was the Cudahy Packing Company the first concern to adopt such a plan of marketing as you have described? A. We were the first Cudahy Packing Company that adopted a definite marketing plan.

Q. There is only one Cudahy Packing Company, or was at the time of the adoption of that plan, isn't that true? A. I do not know anything about any other people. We have never conferred with anybody else. We built up our own plan and followed out our own methods.

Q. Do you know of anyone else that had a similar marketing plan at the time, or prior to the time that the Cudahy Packing Company adopted this plan? A. We have heard all kinds of reports about other people's affairs, but we stick very close to our own knitting and we do not really know what the other chap is doing.

(467) Q. Then you really do not know the answer to that question? A. No, I could not tell you a thing about it.

Q. You have not any idea? A. We have heard things.

Q. What have you heard? A. All kinds of things about what other people are doing, some doing this, and some doing that, some give five per cent cash discount, and others don't give any.

Q. I am referring to the adoption of the plan in point of time, with regard to other concerns. A. Yes. We entered into a given marketing plan, but every other one has a different plan absolutely. I do not think that anybody has copied our plan and we certainly never copied anybody's else plan.

Q. Are there not a great many specialties which are not marketed in the way that you market Old Dutch Cleanser? A. I do not think there is any specialty that is marketed like we market Old Dutch Cleanser, because there are no other specialties like Old Dutch Cleanser.

Q. So it is feasible to market a specialty without adopting the plan of the Cudahy Packing Company? A. Really, I do not know.

Q. You were speaking, Mr. Strauss, sometime back, right broadly on the subject of specialties. A. I was explaining the nature of a highly specialized product.

Q. Well, let us call it a highly specialized product. (468) Is there no other product that is highly specialized besides Old Dutch Cleanser? A. There may be some, and they are marketed in a given way, maybe by aggres-

sive promotion, and detail work amongst the consumers. Every highly specialized article, has a big following of consumers if it is marketed in a uniform way. Otherwise it cannot be a highly developed specialty. That is what makes it so.

Q. Now, as to this price maintenance arrangement,—

A. We have not any price maintenance arrangement on Old Dutch Cleanser. We have a price, but no price maintenance.

Q. Do you mean to say that on Old Dutch Cleanser, you have not got a fixed price at which you accept orders from the wholesaler and another price that he charges the retailer when he sells the goods to him? A. Absolutely. We always have had only one price; never had anything else, and we have always had an absolutely uniform price.

Q. That the wholesaler pays, and the retailed pays, is that true? A. Correct.

Q. And therefore, the wholesaler sells to the retailer and makes no profit, is that true? A. It is correct, as far as it goes.

Q. Does it go far enough? A. The wholesaler can (469) buy, if he is not on our Distributing Agents' list, and make a profit. Would you like to have me explain that to you?

Q. If you would be good enough to save time by answering the questions, you would not have to explain, it would not be required. A. I was going to explain to you, Mr. Smith, that the wholesaler, who is not a Distributing Agent, would have on minimum 25-case lots, taking that as a minimum,—

Q. And he is not permitted to buy any less? A. Yes, he can buy any quantity he likes, a carload if he likes.

Q. But no less than 25 cases? A. Yes, he can buy 10 or five or one.

Q. Didn't you use the word minimum? A. Minimum price which would apply to 25-case lots, which is, \$3.20 a box. Now the average retailers purchases, as we understand it, runs about two cases, some in one-case lots, some five and a very few ten, so that a wholesaler who bought minimum 25-case lots in order to get the minimum price, would still have a profit of between \$3.20 and we will say \$3.35, in other words, 15 cents a box, or about five per cent.

Q. Now, with respect to your Distributing Agents,

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how about them? A. Well, I have explained to you the agent's compensation being based on the single-box price gives him a maximum profit of about 13 $\frac{1}{2}$ per cent.

(470) Q. And that is the difference between the price that he pays you, and the price that he receives from the retailer, isn't it? A. I am figuring out about the average profit that he gets on the goods.

Q. Now, is Old Dutch Cleanser delivered by you to the wholesaler, freight prepaid? A. Yes, all our prices are freight prepaid in five-box lots and upwards.

Q. And all he has to do is to haul them from either your war-house in a given place, or from the common carrier as the case may be, in his city? A. Well, the phrase "freight prepaid", I suppose means that, delivered at the freight station. If the railroad makes the delivery, or has any arrangements for switching or otherwise, of course, that enters into it.

Q. Now, do you solicit business from any wholesale grocers, who are not on your so-called Distributing Agents' lists? A. Not regularly.

Q. Not regularly, did you say? A. Yes, sir.

Q. Does that apply now? A. Yes.

Q. And was that true in the past? A. Yes.

(471) Q. You make no effort to get the trade from them, do you? A. No.

Q. You don't make any effort to increase the size of your Distributing Agents' lists, the number of names on it? A. No, not particularly.

Q. Of course, you, did, as yours were promoting and building up the business, you were anxious to increase those names, were you not? A. The list developed naturally. Any wholesaler was eligible to that list, if he was a wholesaler regularly established in the wholesale business.

Q. Now, you stated in respect to the retail grocers that they frequently or sometimes sold three cans for a quarter, and you said something in your examination in chief, I believe, that the sales by retailers at less than ten cents a can were confined to lots of more than one can, is that correct? A. No, I did not try to convey that thought. I believe that Old Dutch Cleanser the country over, is sold for ten cents per can in any quantity of cans to the extent of at least 85 per cent of the aggregate total consumed.

Q. The only instances are instances where three cans

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for a quarter are sold, or a larger quantity are sold is that right? A. Well, the instances in fact are not so much where the larger number of cans are sold as where (472) the business is being done by a down-town price-cutting department store, the larger stores.

Q. Ten cents a can is the price that the Cudahy Packing Company fixed as the price to the consumer, isn't it? A. It is the price that we advocate, and have uniformly advertised as being the consumer's price per can from the retailer.

Q. Now, you spoke of the function of the distributing agent. That it insured quick deliveries, relieved your Company of that many salesmen, and relieved your Company from the problem of dealing with a number of retail grocers. Is that true? A. Those are some of the things.

Q. I will continue the question and ask you if you could not make just as quick deliveries from branch offices? A. Yes, if we could afford to have branch offices everywhere.

Q. Haven't you branch offices in a great many places? A. We have branch offices for packing house products, but they never touch Old Dutch Cleanser, never even store it and never sell it.

Q. In no city? A. In no city.

Q. How about New York? A. That is a Division office of the Old Dutch Cleanser Department, and has nothing to do with our general business.

(473) Q. I am speaking of Old Dutch Cleanser. A. We have no branch office in any town, excepting where we have a Division Office, and I think we have four of those. I believe that we have at least 400 places where there are jobbing houses, wholesale grocery houses. The proposition of distributing that way, would be impossible to us.

Q. Well, it would be possible to arrange your business in such a way, as you do the Packing House end of the business, with branch offices where quantities of Old Dutch Cleanser could be stored, and from which quick deliveries could be made? A. Our Packing House business is a business that,—

Q. Just answer that question, whether it is not possible? A. No, not at all, unless you mean regardless of expense.

Q. I want to lead up to that.

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MR. MONTAGUE: He will explain that more fully, if you want to know the reason.

MR. SMITH: Oh, well, go ahead. Take up all the time you want.

MR. MONTAGUE: Just explain more fully why it could not be done that way.

THE WITNESS: Our Packing house business is mainly where we have branches,—is a fresh meat business. The product is sold by them in the morning at 3 or 4 o'clock (474) and we only cover that territory where we have branch houses. We don't attempt to cover the trade of the United States and to undertake to distribute Old Dutch Cleanser on the same plan, would be absolutely impossible, it would be an impossible expense.

MR. SMITH: Q. In other words, it all comes down to a matter of expense, doesn't it? A. Oh, yes.

Q. It is possible? A. Yes, we could serve the consumer direct, but we would have to go out of business.

Q. So that that all boils down to a matter of profit, so far the Cudahy Packing Company is concerned?

A. No, I would not call it profit. It is a case of impossible expense.

Q. I mean in order to subserve the profit of the Cudahy Packing Company? A. Well, I should say that that is correct in a broad sense, but is not practically commercially applicable to this case.

Q. Well, for instance, you carry a stock in Baltimore, do you not? A. There is warehouse stock in Baltimore.

Q. I mean, the goods are there? A. Yes.

Q. And you can deliver very promptly, can you not? (475) A. We can deliver pretty promptly in Baltimore, but the object of carrying the stock in Baltimore, is not on account of the quick deliveries. It is on account of the freight saving. We only have one general warehouse, and that is in New York.

Q. I understood you to say that that was one of the reasons, the quick deliveries. A. We have no quick deliveries to make. The wholesalers are the ones who are looked to for that.

Q. The other two points, the credit of the retailer, the Cudahy Packing Company avoiding the employment of a number of salesmen, who wait upon the retail trade, and are now employed by the wholesalers, that is simply

a matter of profits, so far as your Company is concerned, isn't it? A. Yes, like everything else we do.

Q. Now, the function of these canvassers of the retail trade, is to of course advertise the product, the advantages to the retailer in handling the product and generally the building up of the business of the Cudahy Packing Company, is that true, with respect to Old Dutch Cleanser? A. Our canvassers are promoters.

Q. I understand that these canvassers carry with them order blanks. Is that true? A. Yes, most of them do. Not all of them.

Q. Well, how about Baltimore? A. We have men (476) there that do, and men that don't.

Q. How about Block prior to May 12th, 1915? A. Block?

Q. Yes, C. Block. A. I do not remember the particular case.

Q. You have charge of sales, haven't you? A. Well, indirectly, yes, I have general charge of the business.

Q. You have such forms, haven't you? A. Yes.

Q. Order books, order blanks? A. What I said was that I did not know whether Block had them or did not have them.

Q. Is it not customary for these canvassers to take such order books around with them. A. As a usual thing when they go to take an order. I don't know specifically whether Block had or had not.

Q. They are expected to take orders, are they not, from the retailers? A. When they have that authority, and carry order books they are.

Q. Now, I believe you said that this marketing plan of yours would fail, if different prices were quoted by your canvassers and by the wholesale grocer's salesmen to the retailer. The effect of that, however, might be, through competition that the retailer would get a smaller (477) price? A. I don't quite follow your combination.

Q. I guess the grammar is bad. A. Oh, no, the grammar is excellent, but I do not think the commercial application is as good as the grammar. You raise the question, as I understand it, as to the plan failing in the event of our distributing agents' men having different prices. Now, the retailer would, profit by such a condition rather than lose by it, wouldn't he?

Q. That is what I thought? A. If such a condition did exist.

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Q. That is what I meant. A. But the fact of the matter is this, and this is what I started to say or convey in regard to our selling and promotion organization and the uniformity of price; that if we discredit our own men, if they had to ask a bigger price than the distributing agent through his salesmen,—and not alone that, but if the distributing agent selling the goods at one price is unable to get business as against another distributing agent selling goods at another price, that distributing agent, who has not the better price will eventually quit handling the goods and get something that he can substitute. There are a number of substitutes, a multitude of them and you have named two of them, Spotless and Babbitt's that sell at a much lower price than our goods. Now, our plan would fail if that sort of competition continuously existed on a highly specialized product like Old Dutch Cleanser, on which the profit (478) to the distributing agent is comparatively limited and with which he is not particularly satisfied in any event. That is what I wanted to convey.

Q. But ultimately that will go right back to the Cudahy Packing Company profit, will it not? A. It will go back to the eventual successor failure of our business, and of course our profit would be involved in that result.

Q. You mean, in this particular small end of your business? A. Well, I am talking about the Old Dutch Cleanser.

Q. And it is a very small end of your business? A. Well, it is the only business that I have got.

Q. I am not speaking of you personally, I am speaking of the Cudahy Packing Company. A. Well, it is a comparatively small end in dollars and cents, and perhaps as regards the sales and distribution, yes. The packing business is our original business and it is very large, a vast business.

Q. What is the capitalization of the Cudahy Packing Company?

Mr. MONTAGUE: That is objected to as not proper cross examination and also on the grounds stated in the stipulation.

The WITNESS: A. The fact of the matter is that I do not know. If I did know, I do not believe that it would be proper for me to answer.

(479) Mr. SMITH: Q. You mean, you would not tell me if you did know.

Mr. MONTAGUE: I would let him answer it under the objection as noted there.

The WITNESS: Do you want me to give you the general information I have? Our capitalization is a matter of public record, isn't it? I do not really remember, I do not remember exactly, or even relatively, but I think it is a matter of public record.

Mr. SMITH: Q. You do not know it approximately.
A. Yes, I suppose I know it approximately.

Mr. MONTAGUE: The same objection, it is not proper cross examination.

Mr. SMITH: What was the capitalization of the Cudahy Company, in the year 1912?

Mr. MONTAGUE: The same objection.

A. That I do not know at all.

Mr. SMITH: Q. Do you know approximately what it was?

Mr. MONTAGUE: The same objection.

A. The best I could do would be to make a guess and I would not like to guess, because I might be way off. You see I am just a little corner of the business there, it is just a little business inside of a big wheel. They don't tell me so awful much.

Q. So big as all that? A. Then general business is pretty big, yes.

(480) Q. Now, as I understand it, at this time the wholesaler does like Old Dutch Cleanser, is that true?

A. He likes it?

Q. Yes. A. We hope he does, and we think he does.

Q. You find them anxious to handle it? A. I think they all like to handle it.

Q. Do you find the retailer in the same boat? A. Yes, I think so, I think we have got the good will of the general trade to a large degree.

Q. Do you think that the same reasoning which led to the adoption of your marketing plan because the wholesaler and retailer would not take to it, would still apply?

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A. How is that? The same reasoning?

(The question was then read.)

Q. Take to Old Dutch Cleanser, of course. A. It would apply with as great or greater force if the conditions were the same.

Q. But if the conditions were not the same? A. If the goods were unknown and we had to start marketing the goods today, the condition would be as bad or worse.

Q. But the conditions are not the same today, are they? A. As far as the goods are concerned?

Q. Of course. A. We had no trade then, and now we have some trade, so they are not.

(481) Q. So they are not, is that what you say? A. Yes.

Q. Now, there are lots of other goods sold on the open market, aren't there? A. I suppose so.

Q. A great many soaps? A. Soaps and soap powders, cleansers and everything.

Q. Where there is no fixed price to the wholesaler, or fixed price through the wholesaler to the retailer? A. They all have a price just the same as we have.

Q. But that price fluctuates, does it not? A. So does our perhaps.

Q. Perhaps; well, does it as a matter of fact? A. I think if these present conditions continue,—

Q. I am not talking about the present conditions. I am talking about the past. I am not talking about future conditions, or the continuation of any given condition. I am talking about the past. A. In the past our price has not fluctuated.

Q. Neither has the price that the wholesaler charges the retailer, fluctuated. A. That is the same thing, we only have the one price.

MR. SMITH: That is all.

RE-DIRECT EXAMINATION.

By MR. MONTAGUE:

(482) Q. You testified, Mr. Strauss, that this distributing plan as to Old Dutch Cleanser, which you so fully described was necessary in order to get Old Dutch Cleanser introduced. Is some plan necessary in order to main-

tain the existing distribution of Old Dutch Cleanser?

A. I should say that the same plan is at least as necessary, if not more so, today.

Q. What is the function of advertising in your plan?

MR. SMITH: I just want to ask this: whether it is understood that the objections to the testimony, the questions and so forth apply to your present re-examination.

MR. MONTAGUE: Yes, it is understood that the stipulation which we entered into at the beginning applies to each and every question that has been asked by either counsel, or may hereafter be asked by either counsel and such additional objections as have been urged to specific questions are to be understood to be in addition to those covered in the stipulation.

MR. SMITH: Very well, that is the understanding.

MR. MONTAGUE: Q. What is the function of advertising in your plan of distributing and selling Old Dutch Cleanser? A. I do not know that I quite understand you.

Q. What function does the advertising perform? You have described the function which the distributing agent performs, and the function which the Old Dutch (483) Cleanser canvasser performs. Now, what is the function of the advertising, as the Cudahy Packing Company advertises Old Dutch Cleanser? What part does that play? A. It is the essential and basic principle on which we gather our Old Dutch Cleanser business. We talk to the consumer continuously through the medium of publications, magazines and so forth, and we suggest to him the uses, a number of different uses, and we try to get new customers and all this means that by those methods we are soliciting and building up the trade and increasing the uses to which the old customers apply the product. It is our essential medium of keeping Old Dutch Cleanser before the public.

Q. Now, are these results which you have stated that advertising accomplishes, and that you have just described, are they essential to the defendant's business in the distribution of Old Dutch Cleanser? A. Well, they in fact are a part of the whole live issue of the business and as I have had occasion to mention, in this examination, our continued thought and purpose from the beginning has always been to say to the consumer through

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these mediums of advertising, "We have got a good article, a reliable article; it is good for this and good for that; you can buy it at the store at a fair price; it is of uniform quality, and you can get it at a cheap price." Everything we do and say is predicated on that thought and has been continuously in our business.

(484) Q. Now, could these results which you have just described be obtained in any way more economically than by advertising? A. I do not know of any other way at all. I do not know any way in which the public can be reached other than by advertising. There are two theories of advertising that I follow; the first is to acquaint the consumer with the fact that the goods are there, make him acquainted with the goods and their merit. The second is to standardize the goods in the mind of that same consumer. After a woman has once used an article, it happens many, many times that she forgets about it, because somebody else comes along with something else, so that the continuity of advertising is based on the theory of standardizing the product in the mind of the consumer.

Q. Is there any way as economical as advertising for accomplishing those results? A. Oh, no, I do not know of any way of reaching the consumer except by talking to him. I have never thought of any other way that you can talk to the public, except by the medium of advertising, and that is the reason our magazines and newspapers are prosperous, because the merchant and the manufacturer must use that means of reaching his trade.

Q. It is a fact that retailers under your plan, all get Old Dutch Cleanser on an equal basis,—does that fact enter into the good will that your Company has in Old Dutch Cleanser.

(485) Mr. SMITH: That is objected to as leading, and it is further objected to because it calls for the expression of an opinion, and a conclusion.

The WITNESS: A. I should say it enters into it very materially.

Mr. MONTAGUE: Q. How?

Mr. SMITH: The same objection, except that it is not leading.

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A. The retail trade in the aggregate have a great deal to contend with, in buying a product of any kind and the fact that they can buy Old Dutch Cleanser uniformly, with the knowledge that they are not paying any more for the same quantity than any other merchant pays, gives them the confidence to sell the goods fairly and especially gives them a feeling against so-called price cutting or demoralization by price-cutting establishments, such as department stores and the like.

Mr. MONTAGUE: Q. Mr. Strauss, how does your present plan of distributing Old Dutch Cleanser compare as to economy with any other plan that you could have substituted for it?

Mr. SMITH: That is objected to as calling for a conclusion, and the expression of an opinion.

A. We have studied this business very carefully, and have followed it up from the standpoint of getting information ever since we have been in the business. I do not know of any plan to reach the general consuming trade and to build up a business with that trade or increase that business, that can be followed as advantageously as our plan, because, first of all, it gives us the support of the known and established mediums of distribution, which are not alone very extensive, but are very thorough, that is, the retail grocer and the wholesale grocer, and the others who may happen to work with that same class of goods. I am talking now about the general stores and all that sort of thing in the country. So, if we were to be barred from using this plan for any reason, or had to change it, I do not know how we could market our goods at all. It would probably drive us out of business. We certainly could not market the goods through the trade, in that event. You could not fairly say to them, "Well, you are going to get at least a little something for your work, and feel reasonably sure in it." If that channel was stopped for us, we would have to either open branches and put out instead of 100 men (such as we have now),—we would have to probably put out 400 to 600 and that 400 to 600 men would cost us many times what it is costing us now and even with that force, with all those additional men, we would not reach more than 25 to 33 1/3 per cent of the population, we could not get around to

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them at all. The average wholesaler calls on his trade at least two or three times a week. Our 100 men get around twice a year to the principal points and to the outlying points maybe once in three or four years. That gives you a fair idea of the position in which we are placed as regards distribution. Then, of course, it would (487) bring with it costs and expenses that would be prohibitive under our present market price of 10 cents a can. It would possibly mean 20 cents a can, and the trade could not afford to pay that; the consumer could not afford to pay that, so that it would mean that we would have to give up the business, if we could not follow such a plan.

Mr. MONTAGUE: Q. Mr. Strauss, in connection with this question,—those questions which you, on my advice declined to answer, when put to you by Mr. Smith, I have several questions I would like to ask you now. In marketing Old Dutch Cleanser, do you meet competition from manufacturers of rival cleaning preparations?

Mr. SMITH: I, of course, object to your examining him in reference to any matter as to which he refused to answer on my questions.

Mr. MONTAGUE: My purpose in these questions is to develop his reasons for declining to answer. I asked that privilege at the time, but you will recall that you told me that I must wait till you were through cross-examining him.

Mr. SMITH: I think he has given his reason already.

Mr. MONTAGUE: He declined to answer on my advice and for that purpose I desire to bring out the reasons why I so advised him.

Mr. SMITH: I still object to bringing it out, or asking the question for the reasons I stated.

(488) (The pending question was then read.)

The WITNESS: We have a very large and extensive line of competition in the scouring compound line, as well as in kindred lines that are all practically competitive such as scouring soaps, scouring bars, soap powders, which have a vastly bigger trade than the scouring powders, as well as the common laundry soaps.

Mr. MONTAGUE: Q. Is that competition such competition as might be fairly described as being strenuous and even fierce? A. The competition in scouring powders alone, is very, very serious. The soap powders are extensively promoted and very, very strenuously pushed by their respective manufacturers.

Q. Referring to the questions put to you by Mr. Smith, and which you declined to answer, namely, those questions as to the amount you expended for advertising, and how much the advertising would be pro-rated for each can of Old Dutch Cleanser and how many cans of Old Dutch Cleanser you had sold, and what your profits are, and all those questions, do those questions call for information that might be used to your disadvantage by your competitors.

Mr. SMITH: Of course my objection applies to all questions along this line where he refused to answer my question.

(489) Mr. MONTAGUE: Q. Could that be used to your disadvantage? A. We have always considered in our business that that was inside confidential information which would undoubtedly result to our material disadvantage, if it became a matter of knowledge to our competitors.

Mr. MONTAGUE: That is all.

RE-CROSS EXAMINATION.

By Mr. SMITH:

Q. I suppose there is not any competition between the wholesale grocers with regard to Old Dutch Cleanser, so far as the price is concerned, that they charge to the retailer, is that correct? A. The marketing of Old Dutch Cleanser being based on a uniform selling price, that is of course correct.

Q. That is, a uniform reselling price? A. No, selling price.

Q. I am inquiring relative to the lack of competition between wholesale grocers regarding the price of Old Dutch Cleanser, which they sell to the retailers. Is there any competition? A. I think that the competition amongst wholesalers for Old Dutch Cleanser business is very, very keen.

Q. Are you confining your answer,—

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Mr. MONTAGUE: He has not finished his answer.

Mr. SMITH: The question, Mr. Strauss, only relates (490) to the price. Do you get that? Please answer it in regard to the price. A. Only as regards quantity lots.

Q. You don't quite understand it yet. That would not even apply. There would be no competition with respect to a given quantity, so far as the price is concerned, would there? A. Not as to a given quantity perhaps, but let me answer your question. You say is there any competition in price between the wholesalers? Generally speaking, the wholesalers as I understand it, fairly follow the price which we suggest, but they do not by any means under all circumstances do that and so there may be competition, and there very likely is. That is a feature which we do not control. We have not any control over the wholesaler, or the distributing agent, but where we get a chance to follow it up, naturally we do.

Q. What do you do when you follow it up? A. We follow it up, if we find that a wholesaler is cutting the price on Old Dutch Cleanser, we may take a notion to tell him that there is not any necessity for that, and we would like to see him co-operate and sell at the same price that we are selling at and that others are selling at, but whether he does or not, we cannot control at all, and we do not.

Q. If he still persists in his refusal to agree to your co-operation plan, you stop selling him at the price (491) enjoyed by the wholesalers, don't you? A. We don't ask any agreement, and we don't limit him at all. If we find a man unreliable and undesirable from that or other reasons, we probably take him off the list.

Q. I am not inquiring about the other reasons. I am inquiring about the specific— A. We may, or we may not.

Q. —specific point. Where has it been done where you have not stopped selling the wholesaler at the wholesale price under those circumstances? A. Well, we have any number of such instances.

Q. Name them. A. Well, we have a place here in Chicago, Reid-Murdock, for instance.

Q. When did you find it out? A. I don't remember just when we found it out.

Q. How long have you been selling him since you found it out? A. How long?

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Q. At the wholesale price? A. We have no wholesale price. We kept him on the distributing agents' list.

Q. But you have not been selling him at the wholesale price? A. We have kept him on the Distributing Agents' list.

Q. Will you please answer the question. A. I can- (492) not. That question cannot be harmonized with the facts. We have kept him on the wholesale list and given him the Distributing Agents' compensation. We have no wholesale price.

Q. Do you, or have you since you found it out, sold him at a net cost to him which is the same as the net cost of a given quantity bought by other wholesalers?

Mr. MONTAGUE: That is objected to on the ground that the question has been already answered, and, in so far as it assumes that there is such a thing as a wholesale price, it assumes something contrary to the fact as already appears in the evidence. The evidence shows that there is a Distributing Agents' compensation, and that there is a general list price and those are the only two and I submit that it is improper for counsel to propound questions in which he uses the words "wholesale price" and tries to contradict the facts which have been shown in the evidence and have not been there contradicted, but stand uncontradicted.

(The pending question was then read.)

The WITNESS: We have sold Reid-Murlock at the regular general sales list price.

Mr. SMITH: Q. But you have not given him what you call the compensation? A. You did not allow me to finish my answer.

Q. Will you answer that?

Mr. MONTAGUE: Let the witness finish.

(493) The WITNESS: I would like to answer this one question first, and then perhaps you won't have to ask me another one.

(The answer was then read as far as given.)

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A. (Continued) And have had him on our Distributing Agents' list continuously, and he is consequently receiving the compensation allowed the Distributing Agents.

Mr. SMITH: Q. How long have you been doing that since he stopped selling at your list price? A. I do not know that he stopped selling at our list price.

Q. He still sells at your list price? A. I did not say that.

Q. Which is it? A. I said I did not know.

Q. I understood you to say that he does not sell at list prices. A. I did not say that, I said I did not know that he was selling.—

Q. Didn't you give him as an illustration of a man to whom you still sell at the list price or, if you wish me to put it this way, give him the usual compensation, allowed to distributing agents, despite the fact that you have heretofore discovered that he cuts prices in the reselling to retailers? A. Let me make clear what I said. You asked me a certain question, and I answered it as follows: There was one case that you wanted cited where, (494) in spite of the fact that the distributing agent had sold at less than our list, we had still not taken him off our distributing agents' list, but had continued him on that list and allowed him all the advantages that accrue to those distributing agents.

Q. How long have you been continuing that since you found it out? A. Continued it right along.

Q. Well, how long? A. Oh, I don't remember when it occurred, maybe a year ago.

Q. Does he still to any extent sell below the list price to the retailer? A. I do not know.

Q. Oh, you don't know. And if you did know, what?

Mr. MONTAGUE: I object to that.

A. I cannot tell you. What I might do, if I was on top of that building and wanted to jump down, I really cannot tell you now.

Mr. SMITH: Q. After you found out that he was violating the rules, did you call him to account? A. Did we call him to account?

Q. Yes. A. We gave him the details of the facts

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about a single case, where there was apparently some little error on the part of one of his men, and that is all we have ever heard about it.

(495) Q. He stopped it? A. I don't know whether he did or not. I never had anything to say to him about it.

Q. The subject has never come up since? A. Nothing further.

Q. And you do not know whether he still does it or not. A. That is what I said.

Q. Did he promise to be good? A. As I said, I did not even talk to him on the subject.

Q. You know a good deal about it. Do you know that? A. His attention was called to one case, that such and such a case had occurred and we said to him "We wish to call it to your attention," or words substantially to that effect.

Q. And that you did not want him to continue it? A. No, sir, there was nothing said to that effect.

Q. Did he make any statement to the effect that he would not continue the practice? A. When the man did not say anything further, and I did not say anything further, that could not have been the case, could it? That is all that was said, as I told you.

Q. Of course, when you said that it would drive your Company out of business to cease the present plan of marketing Old Dutch Cleanser, you only meant that it would drive it out of the Old Dutch Cleanser end of the line, isn't that right? A. I only have reference to Old Dutch Cleanser.

Q. It has nothing to do with the main activities of (496) the Company? A. No.

Q. Of course, assuming that your marketing plan is unlawful, you will find some other way, won't you?

MR. MONTAGUE: That is objected to on the ground that it is entirely hypothetical and not proper cross examination.

A. Well, we do not know that our plan is unlawful and we are not worrying about what the future may have in store for us.

MR. SMITH: Q. You mean you think that?

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Mr. MONTAGUE: That is objected to on the ground that it is not proper cross examination.

Mr. SMITH: Q. There are a great many scouring compounds in which there is competition with regard to prices and quantity and customers, isn't that true? A. Yes.

Q. And that is true among the wholesale grocers handling such products? A. I think so.

Q. Don't you know? A. I never have been a wholesale grocer.

Q. Well, doesn't your knowledge of the scouring compound business extend to that extent? A. I know that there is a good many products on the market that are being actively sold, but just how they are marketed or whether the wholesale grocers are interested in them, or how much they are interested in them, I do not know. (497)

Q. And you do not know in regard to any of them whether there is competition in price? A. If there is—

Q. Among the wholesale grocers? A. I do not know.

Q. Do you know that there are a lot of things in the wholesale grocery business, that are sold without extensive advertising, and without any advertising? A. Yes.

Q. A great many articles which are sold to the wholesale grocer and by the wholesale grocer to the retailer without advertising? A. Staples are.

Q. Well, it is true of a great many soaps, isn't it? A. Soaps are generally more or less specialized. Take Ivory soap, for instance, that is heavily advertised.

Q. Well, but there are lots of other soaps that are not advertised at all, are there not? A. Well, the reason for that, the answer to that, is this: that they are, if specialized products, they either have very ancient reputation which stands in lieu of advertising, or they advertise locally by different means. I think the advertising is very extensive on all lines of soap and soap products.

Q. The wholesaler, for instance, in the course of a season's business, through his salesmen, or through his (498) catalogue, advertises everything that he handled, doesn't he? A. I don't call that advertising.

Q. You do not? A. Not what the wholesaler does.

Q. Isn't that all the advertising that a great many soaps and scouring compounds get? A. Yes, I imagine

there are a good many products that are sold that way.

Q. That is all the advertising that a scouring compound in bulk gets, isn't it? A. There is not any such thing.

Q. Isn't there such a thing as a scouring compound in bulk? A. There may be an article of that kind put up, but I venture to say that not one-tenth of one per cent is marketed through the wholesale grocery trade in comparison with the package goods.

Q. Don't you know, as a matter of fact, that there is a powdered form of scouring compound which is sold in bulk, as being Old Dutch Cleanser? A. I do not believe there is any such thing. If we thought there was, we would not let it go on for a moment, if we thought we could help it, and I think we could.

Q. Don't you know that there is a scouring compound along the line of Old Dutch Cleanser, which is sold in bulk? A. No, I do not.

(499) Q. I want to know what a can of Old Dutch Cleanser filled and labeled, costs the Cudahy Packing Company?

MR. MONTAGUE: I object to that on the ground that it is not proper cross examination.

A. I refuse to answer on the advice of counsel, because the information desired is a trade secret and the disclosure of it might and probably would be of advantage to our competitors and to the serious disadvantage of ourselves.

(500) THE COURT: If you describe in any part of that deposition that which shows or tends to show in your view that the defendant did not notify every so-called jobber or so-called distributing agent that it expected him to maintain prices and that he must not sell to anybody below the prices to another jobber, that part of the testimony I would want to let in. I do not recall that there was any such testimony.

MR. BAKER: One question and answer here reads: "Did you adopt a plan in respect to the marketing of Old Dutch Cleanser." A. Yes. That might be admissible.

THE COURT: That would not be important unless it tells what the plan was.

MR. BAKER: If there is any part of this deposition—

THE COURT: I can only say that if there be any por-

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tion of that testimony that shows or in your view tends to show, first, that the defendant did not notify his jobber or his distributing agent, or whatever you choose to call them, that it expected them to maintain its retail price and not to sell to anybody, other jobbers or distributing agents or retailers, or, if you will, if the testimony contains any statement which tends to show that upon knowledge that any jobber or distributing agent was willfully refusing to comply with that request that they did not remove him from the list of their distributing agents, or did not refuse to sell him at distributing agents' prices, I shall be very glad to admit any part of that testimony. My own recollection is that there was no such testimony.

MR. MONTAGUE: In reply to your suggestion, I can only state that we offer this deposition and each and every part of it separately and as a whole. The offer is under our plea in this case to meet the issues there raised.

THE COURT: I request counsel as an officer of the court to answer my question as to whether there is any part of that tends to meet either of those particular issues of fact.

(501) MR. MONTAGUE: I submit that each and every part of it taken separately and together does tend to meet that and for that purpose I offer the deposition.

THE COURT: Then I will let each one of the questions be read and let counsel for the plaintiff interpose his objection and I will rule on it. This is not the treatment that the court at this time has a right to expect from counsel.

MR. MONTAGUE: I might suggest in my own defense, in reply to your Honor's criticism, that I assumed it was the practice of this court, as it is the practice in very many jurisdictions—

THE COURT: Two days ago I made some request of you for the saving of time of the court that you would call to my attention those portions of the testimony which, in your view, were not included in the general ruling of the Court of Appeals as I have interpreted that ruling to you. I have asked you to do that repeatedly.

MR. MONTAGUE: I think if you are going to go into that conversation you will have to hear me out in this, that you might have—

THE COURT: But I say to you that the Circuit Court

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of Appeals' ruling does not allow any evidence that tends to sustain your side of the question on the two issues of fact which I have stated, and I have asked you whether, in your judgment as an officer of the court, there are any questions there that do tend to show either that they did not ask the wholesalers or distributors to maintain these prices, that they did not tell them that they must not sell to other jobbers or distributors, or any denial or any statement by Mr. Strauss that it was not the policy of the Cudahy Packing Company to refuse to allow any one to obtain from them at jobbers' or distributing agents' prices any goods if they were convinced that such person was wilfully and habitually cutting prices. If there is any such testimony there I want to let it in. As I remember reading it over I did not find (502) any testimony that dealt specifically with those questions at all. As I remember the testimony it was giving various explanations of why they followed the policy of sending circulars and what not.

Mr. MONTAGUE: My contention is that all those questions and all those answers tend to prove the negative of those questions. I know that your Honor, in conversation with me the other day and in a statement today, takes a contrary view, constrained doubtless by the Circuit Court of Appeals.

The COURT: No, we are dealing at cross purposes. The Circuit Court of Appeals did not say that a man could not deny that he was trying to maintain resale prices. They did not say anything of that kind, and no reasonable man would say it—and I know that neither you or I suppose they did say anything of the kind, nor did they say that a defendant in like case with this defendant was in the habit of cutting off of his preferred list of purchasers, or whatever you choose to call it, any one who so broke that requirement and sold below the resale prices fixed, you could not deny it. You can deny it. The Court of Appeals never dreamt of saying that you can not deny it. And if there is anything there that Strauss say that tends to deny it I will let it in.

Mr. MONTAGUE: I submit that everything he says tends to deny that, your Honor.

The COURT: I will adhere to my ruling and exclude it.

(Exception noted.)

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To the sustaining of the plaintiff's objection aforesaid, to which exception was noted, and excluding the deposition from page 9 the defendant excepted, and now prays the court to sign and seal this its one hundred and thirty-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(503) Mr. MONTAGUE: In view of the ruling which your Honor has made in respect to the relevancy and materiality of the testimony of Mr. Strauss, I shall not do as I had anticipated several days ago, namely, to call a witness for the purpose of making an offer of proof in respect of the details of our plans, because my offer would be merely that the witness would, in response to questions by me, make substantially the same answers, the very same answers that Mr. Strauss made.

The COURT: If you want to reserve your rights you had better do that, because in that way I can get up to any questions and perhaps remove the difficulty that has just occurred, and secondly, it might be that some of the Court of Appeals would be quite of my mind as to the impropriety of letting in the deposition.

Mr. MONTAGUE: In that respect I find myself in this situation: When your Honor very courteously told me several days ago what your then attitude was in respect of the relevancy and materiality of this, knowing your Honor is relying on both grounds, I made no further efforts to get this man—

The COURT: That is your funeral, more or less.

Mr. MONTAGUE: But knowing and anticipating that your Honor was going to rule that way, I did not keep that man here and that is the reason why I do not make the offer.

Mr. BAKER: You were going to produce testimony about how long you had been stamping your bills with that stamp.

Mr. MONTAGUE: I have made inquiry of the office with regard to that.

The COURT: The stamp is this: "All your quotations, bids, sales and invoices for Old Dutch Cleanser, either to jobbers, semi-jobbers, retailers or consumers, should be

at a rate not lower than laid down in our published general sales list?

(504) Mr. MONTAGUE: What was the date of that?

The COURT: August 28, 1913.

Mr. MONTAGUE: The information I get is that a notice either in that form—

Mr. SMITH: You said you were to prove this.

Mr. MONTAGUE: No, I said I would stipulate this. I will give it to you privately, if you wish.

The COURT: Wait until he finishes what he has to say and we will put it in as a stipulation or not.

Mr. SMITH: I thought he was wasting the time that should be taken up by the witness.

Mr. MONTAGUE: I will tell you privately, if you wish, then you can decide whether you want it or not.

Mr. SMITH: No.

Mr. MONTAGUE: That notice, for some short time previous to August 28, 1913, up to the present time, either in that form or instead of the word "should", "are requested", either in one form or the other, has been used up to the present time.

The COURT: That is sufficient, I take it. You are perfectly willing that that should go in.

Mr. BAKER: Yes.

Mr. BOWIE: That concludes the defendant's case.

The COURT: Now I think I will excuse the jury in this case until two o'clock.

Mr. SMITH: We wanted to put Mr. Frey on the stand for the purpose of dividing up the whole volume of business from the time he was cut off up to the time of the institution of the suit, and from the time of the institution of the suit up to the day of the trial. It is not divided in that way, but we can divide it.

The COURT: I shall probably rule with you, or at least submit the question separately to the jury, as to the two elements of damage up to the time of the cutting (505) off and the bringing of the suit and from the time of the bringing of the suit to the time of the trial.

Mr. BOWIE: The point of my objection is that it is not proper rebuttal.

The COURT: It is not proper rebuttal, Mr. Bowie, but whether proper rebuttal or not, it has become in this case

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a desirable thing to do in the interest of justice, that is to say, to get clear something that is not precisely clear now, and I feel that I have the entire right to do it and so I shall do it.

Mr. BOWIE: Then it may be necessary for us to go into the question of the books very carefully, if they are going to reopen this entire question.

The COURT: There is no reopening, Colonel Bowie. All I presume he is going to do is to prove what the total amount of business was that he did in the fiscal year 1915, to which he has already testified, the business done before the 15th of May, or whenever it was that this suit was brought.

Mr. BOWIE: If he will give us those figures we will admit them.

(List of figures shown to counsel and to court.)

The COURT: I think this agrees so nearly with the testimony already in and not contradicted that it might be agreed to. He says the sales from the time of being cut off, February 1, 1914, to May 12, 1915, were \$1,995,000. Now that was for the period of one year and three months and a half, and that is so nearly in consonance with the testimony that it would not pay any of us to waste time in figuring that. It says also that from the time he was cut off down to the date that this trial began, he has done just about twice the amount of business he did in that period of fifteen and a half months. Now that is not going to hurt anybody. It may be stipulated that Mr. Frey would testify if he took the stand, that the volume of business he did from February 1 to May 12th was \$1,995,104.95, and from that period, May 12th, 1912, to (506) the date of trial, the business done was \$3,869,000. Now I take that last part subject to exception, under my former ruling. My present impression will be that I shall not let the latter part go to the jury as I now understand the cases.

Mr. BOWIE: Then I had better move to strike out that portion of it.

The COURT: You can put in a motion presently asking to strike out all testimony tending to show damage after the date that the suit was brought.

Mr. SMITH: There is one other figure that is not on the front sheet and that is the amount of business

done from October 15, 1914, up to the date the suit was brought and up to the day of the trial.

The COURT: The amount of business done between October 15, 1914, to May 12, 1915, that is from the date of the passage of the Clayton Act to the time of the institution of the suit, was \$895,249.21. Of course, those great big figures are only figures to figure down from, and to figure very far down from. The theory is that the volume of business during the preceding years when the average sale of Old Dutch Cleanser was 2,200 cases was \$1,300,000, and the price received for it was something like one-half of one per cent of the total business.

Mr. MONTAGUE: Was there an objection made and exception noted to all these figures on the ground that having already shown sales of Old Dutch Cleanser and profits, that therefore this general volume of sales becomes irrelevant?

The COURT: No, it was not made because I ruled that the percentage of his profits on all his business was unimportant. The question now is merely whether the jury will or will not—it is a matter entirely with them—assume that as his business increased from perhaps an average of a million three hundred thousand dollars during the period he was getting it per year, to an average of from one million six hundred thousand dollars, or whatever it happens to be, that if they could have got (507) ten Old Dutch Cleanser, their sales of Old Dutch Cleanser would have increased in the same proportion. Therefore your objection is not applicable to this.

Mr. MONTAGUE: I wanted to make sure for myself that if his business increased from one million six hundred thousand dollars to one million eight hundred thousand dollars, which is an increase of one-eighth, on his Old Dutch Cleanser sales, that they would increase one-eighth.

The COURT: Yes. That is entirely a matter for the jury. They are not bound to take that into consideration.

Mr. MONTAGUE: I understood that to be the rule laid down by the Circuit Court of Appeals, from which I have to dissent, and may I make an exception on that ground?

The COURT: Yes.

To the overruling of the defendant's objection afore-

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said, to which exception was noted, the defendant excepted, and now prays the court to sign and seal this its one hundred and thirty-fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. MONTAGUE: Then to all the figures on that question I object and move to strike out and will take an exception to the denial of the motion.

The COURT: Very well. I am not prepared to rule on your motion to strike out, however.

Mr. MONTAGUE: No, sir, it is just these figures that you have in your hand, because I think I have protected myself as to all previous ones.

The COURT: What is the ground of the objection to these figures? If you will specify your objections so (508) that I can rule on them, all right. It is not sufficient to say that it is "incompetent, irrelevant and immaterial."

Mr. MONTAGUE: My theory is that, having already shown how much Old Dutch Cleanser he sells in a year, and working on the demand he has had, he has got to tie himself up to what his commission on Old Dutch Cleanser would be without running into big general averages—

The COURT: I overrule that, because I think the Circuit Court of Appeals has ruled on that.

(Exception noted.)

To the overruling of the defendant's motion aforesaid, to which exception was noted, and refusal to strike out, the defendant excepted and now prays the court to sign and seal this its one hundred and thirty-fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. SMITH: The total volume of the business done by the plaintiff from February 1, 1914, to October 15, 1914, was \$1,099,855.74.

Mr. MONTAGUE: Of course we reserve an exception to this also.

The COURT: Yes.

And defendant now prays the court to sign and seal this its one hundred and thirty-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(509) Mr. SMITH: We would like to offer this amended declaration.

Mr. BAKER: Can I make the motion that all the motions and demurrers stand as having been filed to the amended declaration?

The COURT: Yes.

Thereupon—

STEWART R. WILCOX, a witness heretofore sworn and whose examination was temporarily suspended, resumed the stand for

DIRECT EXAMINATION (Continued).

By Mr. BAKER:

The WITNESS: I have made a careful search and I can not find any orders back of 1916.

Q. How did you come to make a statement yesterday that you kept them for three years? A. I knew there was a great deal of correspondence in the vault where we kept the correspondence and I was under the impression that there were some orders there in connection with the correspondence and I found that the orders that were there were some in 1916. I had not made a search before I came here and I was only answering to the best of my knowledge.

CROSS EXAMINATION.

By Mr. BOWIE:

The WITNESS: There were several 1916 orders down there; I didn't take account of them. I have no idea how

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many there are. I have not looked over them to find out how many cases. It would be very nearly impossible to do that, because perhaps all the 1916 is not there; it may only be a part of it; I have not made a search to find out what was there and what was not. I do not know just what papers are there and what papers are not.

RE-DIRECT EXAMINATION.

By MR. BAKER:

The WITNESS: There is a very large volume of papers (510) there. (Testimony of witness concluded.)

The COURT: That concludes all the testimony, I suppose.

Whereupon the defendant offered the following prayers:

DEFENDANT'S PRAYER NO. 1.

(511) The defendant prays the court to instruct the jury that under the pleadings and evidence in this case, there is no legally sufficient evidence to entitle the plaintiff to recover and their verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 2.

The defendant prays the court to instruct the jury that there is no evidence in this case legally sufficient to entitle the plaintiff to recover under the first count in the declaration, and in determining their verdict the said count cannot be taken into consideration.

DEFENDANT'S PRAYER NO. 3.

The defendant prays the court to instruct the jury that there is no evidence in this case legally sufficient to entitle the plaintiff to recover under the second count in the declaration, and in determining their verdict the said count cannot be taken into consideration.

DEFENDANT'S PRAYER NO. 6.

The defendant prays the court to instruct the jury

that if you find that the only purchases and sales of Old Dutch Cleanser which the plaintiff made, or was actually prevented from making, were transactions wholly within the State of Maryland, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 7.

The defendant prays the court to instruct the jury (512) that unless you find some contract, combination, conspiracy, discrimination or arrangement directly restraining commerce between one state or territory or the District of Columbia and another state or territory or the District of Columbia, to which the defendant was a party and which injured the plaintiff, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 8.

The defendant prays the Court to instruct the jury that if Old Dutch Cleanser distributing agents refused to sell the plaintiff Old Dutch Cleanser at less than the prices listed by the defendant or at any price solely because the defendant had suggested that they so refuse, but wholly without any obligation or compulsion upon them so to do, you must treat such refusal as lawful.

DEFENDANT'S PRAYER NO. 9.

The defendant prays the court to instruct the jury that if Old Dutch Cleanser distributing agents refused to sell the plaintiff Old Dutch Cleanser at less than the prices listed by the defendant or at any price primarily because they did not wish to strengthen their own competitor or because they did not wish to give up any of the profit which the list prices afforded them, and only secondarily because the defendant had suggested that they so refuse, you must treat such refusal as lawful.

DEFENDANT'S PRAYER NO. 10.

The defendant prays the court to instruct the jury that if Old Dutch Cleanser Distributing agents refused to sell the plaintiff Old Dutch Cleanser at less than the prices listed by the defendant or at any price because

they did not wish to strengthen their own competitor, or because they did not wish to give up any of the profit which the list prices afforded them, you must treat such refusal as lawful.

DEFENDANT'S PRAYER NO. 11.

(513) The defendant prays the court to instruct the jury that a mere difference in the price or prices quoted to different customers is not a discrimination within the meaning of the Anti-Trust Laws; in order to constitute a discrimination, the difference must be so great as to be unreasonable or unjust.

DEFENDANT'S PRAYER NO. 12.

The defendant prays the court to instruct the jury that even though you should find that the defendant did quote a higher price to the plaintiff than to other jobbers in Baltimore, the defendant does not for that reason become liable in damages unless you also find from the evidence that the effect might be to substantially lessen competition or tend to create a monopoly.

DEFENDANT'S PRAYER NO. 13.

The defendant prays the court to instruct the jury that it is no unlawful discrimination for a manufacturer or other vendor to select his own *bona fide* customers, provided the effect of such selection is not to substantially and unreasonably restrain trade. It does not substantially and unreasonably restrain trade to quote a higher price to a man who is using his dealing to injure the vendor, when said vendor makes and sells a highly advertised article such as Old Dutch Cleanser.

DEFENDANT'S PRAYER NO. 14.

The defendant prays the court to instruct the jury that the defendant in this case has the unquestioned right to stop dealing with a jobber for reasons sufficient to itself.

DEFENDANT'S PRAYER NO. 15.

The defendant prays the court to instruct the jury (514) that any manufacturer has the unquestioned right

to deal with, or to stop dealing with, any jobber of his product, and that the reason is of no consequence.

DEFENDANT'S PRAYER NO. 16.

The defendant prays the court to instruct the jury that where the manufacturer distributes his product through jobbers upon whose methods of business he is largely dependent for the distribution of his manufactured product, he has the right to choose the jobbers through whom he will sell and distribute his product, and that the motives influencing his choice are the concern of not one but himself.

DEFENDANT'S PRAYER NO. 17.

The defendant prays the court to instruct the jury that the defendant, Cudahy Packing Company, had an unquestioned right to cease dealing with, or to quote a higher price to the plaintiff, Frey & Son, Incorporated, than it did to its regular distributing agents, and to cease using said plaintiff as one of its distributing agents and that it is immaterial whether the defendant, Cudahy Packing Company, refused to sell, or quoted a higher price to the plaintiff, Frey and Son, Incorporated, or refused to use the said plaintiff as a distributing agent, because it was cutting the price of Old Dutch Cleanser, or whether it was for any other reason.

DEFENDANT'S PRAYER NO. 18.

The defendant prays the court to instruct the jury that a manufacturer who has created and continues to create and promote by its merit, by the use of canvassers, and by the use of an extensive campaign or system of advertising, and who markets his product under a trade name or brand which he has made known and valuable by the foregoing methods, has in such manufacturing business connected with such trade name or brand and its reputation, created a valuable property in the maintaining of which he has an interest, and that he has an (515) unquestioned right to protect such property by any reasonable method including both the right to refuse to sell and the right to make reasonable differences in the price basis quoted.

DEFENDANT'S PRAYER NO. 19.

The defendant prays the court to instruct the jury that it being open to anyone else to make and sell a competing scouring powder or scouring soap or cleaning preparation under any other name which does not infringe upon the trade name "Old Dutch Cleanser", a refusal by the defendant, Cudahy Packing Company, as a manufacturer of Old Dutch Cleanser having an exclusive right only in the trade name, to allow the distributing agents compensation or discount to a dealer who resells at less than the list price, is not a restraint of trade, and is not unlawful under the antitrust laws.

DEFENDANT'S PRAYER NO. 20.

The Defendant prays the court to instruct the jury that everyone is at liberty to make and sell scouring powder or scouring soap or cleaning preparations in his own name just as the defendant, Cudahy Packing Company, can under its trade name Old Dutch Cleanser. There is no evidence in the case that the defendant, Cudahy Packing Company, has attempted, in violation of the anti-trust laws, to monopolies the sale of scouring powder or scouring soap, or cleaning preparations, and it is not liable under the anti-trust laws to the plaintiff merely by reason of its exclusive right to make and vend a cleaning preparation under the name of Old Dutch Cleanser.

DEFENDANT'S PRAYER NO. 21.

The defendant prays the court to instruct the jury that there is no evidence that the defendant, Cudahy Packing Company, has attempted by contract, combination or conspiracy with any person or persons to unduly restrain interstate commerce in scouring powder, or (516) scouring soap, or cleaning preparations generally, and you are to determine from the evidence whether, under all the circumstances of the case, there was any contract, combination, or conspiracy between the defendant and any person or persons regarding the interstate trade or commerce in Old Dutch Cleanser which materially and unduly restrained interstate trade and commerce in scouring powder, or scouring soap, or cleaning preparations.

DEFENDANT'S PRAYER NO. 22.

The defendant prays the court to instruct the jury that one who desires to become a distributing agent of Old Dutch Cleanser has no right to complain because the defendant, Cudahy Packing Company, chooses another to do this work unless the defendant owes some duty to sell Old Dutch Cleanser to him.

DEFENDANT'S PRAYER NO. 23.

The defendant prays the court to instruct the jury that even if you should find that the defendant discriminated in price against the plaintiff, unless you also find that the effect of so doing was to substantially lessen competition, or tend to create a monopoly in the field of cleaning preparations adapted for the same general purposes as Old Dutch Cleanser, you must treat such discrimination as lawful.

DEFENDANT'S PRAYER NO. 24.

The defendant prays the court to instruct the jury that it nowhere appears that the defendant ever refused to sell the plaintiff Old Dutch Cleanser.

DEFENDANT'S PRAYER NO. 25.

The defendant prays the court to instruct the jury that even if you should find that the defendant refused to sell the plaintiff Old Dutch Cleanser or discriminated in price against the plaintiff, if you also find that such refusal or discrimination was not undue but was (517) reasonably necessary to preserve the defendant's business and property in the good will and trade name of Old Dutch Cleanser and in the distribution and sale of Old Dutch Cleanser, you must treat such transaction as lawful.

DEFENDANT'S PRAYER NO. 26.

The defendant prays the court to instruct the jury that unless you find that there was some contract, combination, conspiracy, monopoly, attempt to monopolize, or

discrimination to which the defendant was actually a party, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 27.

The defendant prays the court to instruct the jury that the defendant, Cudahy Packing Company, does not and cannot control, nor does the evidence show that it seeks to control or monopolize the production of or market for scouring powder or scouring soap or cleaning preparations. The evidence shows that the cleaning preparation which the defendant, Cudahy Packing Company, manufactures constitutes but a small percentage of the scouring powder, scouring soap and cleaning preparations available for the public. The defendant, Cudahy Packing Company, has the exclusive property right in the trade name "Old Dutch Cleanser". The exclusive property right is not a monopoly within the meaning of the Anti-Trust Laws, and no one but the defendant, Cudahy Packing Company, or one having its permission can sell any cleaning preparation under that name. The defendant has a perfect right to use all reasonable means to protect such exclusive right in its trade name, and reasonable efforts to maintain the resale prices on its product are among the means which it may use, provided it does not seek by a combination, contract or conspiracy to create a restraint of trade or a monopoly, or an attempted monopoly in trade or commerce.

DEFENDANT'S PRAYER NO. 28.

(518) The defendant prays the court to instruct the jury that the mere desire of the vendor or manufacturer to maintain the resale price on his article, with a request to buyers to maintain such resale price, is perfectly lawful, and is not rendered unlawful by the request being accompanied by the understanding, on the part of the buyer, that it is the policy of the manufacturer to quote a higher price to any one who refuses to observe such request.

DEFENDANT'S PRAYER NO. 29.

The defendant prays the court to instruct the jury that if you find that the purpose of the defendant in re-

questing purchasers to resell at certain prices, and in quoting a lower price to those who complied with its request, was not to restrain trade or attempt to create a monopoly, but was a method adopted by the defendant to protect its own trade name and extend its business without prejudice to its competitors, then the plaintiff is not entitled to recover.

DEFENDANT'S PRAYER NO. 30.

The defendant prays the court to instruct the jury that the mere fact that the exercise of the right of selection of customers may or does tend to keep prices uniform, does not render such selection unlawful or constitute a violation of the anti-trust laws.

DEFENDANT'S PRAYER NO. 31.

The defendant prays the court to instruct the jury that a manufacturer who has created and continues to create and promote a market for his product by its merit, by the use of canvassers, and by an extensive campaign or system of advertising, and who markets his product under a trade name or brand for which he has made and continues to make a market by the foregoing methods, has in such manufacturing business connected with such (519) trade name or brand and its reputation, created a property the value of which consists in the maintenance of the market so established; that he has a right to protect his property by request to customers to sell the product at certain prices, and he may lawfully quote a higher price to any customer who does not comply with his request but who cuts or lowers the prices of his product.

DEFENDANT'S PRAYER NO. 32.

The defendant prays the court to instruct the jury that a manufacturer who has created and continues to create and promote a market for his product by its merit and by the use of canvassers and by an extensive campaign or system of advertising and who markets his product under a tradename or brand which has become known and valuable by reason of the employment of the foregoing methods, and among other things has regarded it as a matter of good business policy to sell his goods

at a higher price compared with his competitors, as an indication of their superior value, may, legitimately, in order to maintain the market for his goods which he has thus acquired, request customers not to sell the product below the established price, and he may properly and lawfully quote a higher price to customers who do not comply with his request, and in so doing he will not be guilty of a violation of any provision of the anti-trust laws.

DEFENDANT'S PRAYER NO. 33.

The defendant prays the court to instruct the jury that the defendant, Cudahy Packing Company, does not and cannot control nor does the evidence show that it seeks to control or monopolize, the production of or the market for scouring powder, or scouring soap, or cleaning preparations. The evidence shows that the cleaning preparation which it manufactures constitutes but a small percentage of the scouring powder and scouring soap and cleaning preparations available for the public. The defendant, Cudahy Packing Company, has the (520) exclusive property right in the trade name "Old Dutch Cleanser". This exclusive property right is not a monopoly within the meaning of the anti-trust laws, and no one but defendant or one who has lawfully acquired its product can sell a cleaning preparation under that name. The defendant, Cudahy Packing Company, has a perfect right to use all reasonable means to protect such exclusive right in its trade name, and reasonable efforts to maintain the wholesale prices of its product are among the means which it may use, provided it does not seek to create a combination, contract, or conspiracy with others in undue restraint of trade or a monopoly or an attempt to monopolize trade or commerce.

DEFENDANT'S PRAYER NO. 34.

The defendant prays the court to instruct the jury that there is nothing in the anti-trust laws which forbids a manufacturer selling his product to a jobber and placing reasonable restrictions upon the prices at which such jobber shall sell the goods.

DEFENDANT'S PRAYER NO. 35.

The defendant prays the court to instruct the jury that unless you find some arrangement between the defendant and other persons that was undue and beyond what was reasonably necessary to preserve the defendant's business and property in the good will and trade name of Old Dutch Cleanser and in the distribution and sale of Old Dutch Cleanser, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 36.

The defendant prays the court to instruct the jury that unless you find some arrangement between the defendant and other persons that was abnormal and undue and in excess of what normal business usage sanctions for the preservation of the good will and trade name and distribution and sale of a widely-advertised popular trade-marked grocery specialty, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 37.

(521) The defendant prays the court to instruct the jury that if you find that the market for cleaning preparations, adapted for the same general purposes as Old Dutch Cleanser, was free and open to competing cleaning preparations and to competitors of the defendant and not dominated or controlled by Old Dutch Cleanser or by the defendant, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 38.

The defendant prays the Court to instruct the jury that if you find that Old Dutch Cleanser distributing agents sold Old Dutch Cleanser at the prices listed by the defendant, because they thought such prices fair or they did not wish to give up any of the profit which the list prices afforded them, you must treat such transactions as lawful.

DEFENDANT'S PRAYER NO. 39.

The defendant prays the Court to instruct the jury

that if you find that the Old Dutch Cleanser Distributing agents sold Old Dutch Cleanser at the prices listed by the defendant primarily because they thought such prices fair or they did not wish to give up any of the profit which the list prices afforded them, and only secondarily because the defendant had suggested these list prices, you must treat such transactions as lawful.

DEFENDANT'S PRAYER NO. 40.

The defendant prays the Court to instruct the jury that if you find that the Old Dutch Cleanser distributing agents sold Old Dutch Cleanser at the prices listed by the defendant solely because the defendant had suggested these list prices, but wholly without any express or implied obligation or compulsion whatsoever upon them to (522) do so, you must treat such transaction as lawful.

DEFENDANT'S PRAYER NO. 41.

The defendant prays the Court to instruct the jury that unless you find that the defendant imposed on others some express or implied obligation or compulsion to sell Old Dutch Cleanser at the prices listed by the defendant that amounted to a restraint of trade, you must treat such transaction as lawful.

DEFENDANT'S PRAYER NO. 42.

The defendant prays the court to instruct the jury that a manufacturer who has created and continues to create and promote a market for his product by its merit, by the use of canvassers, and by the use of an extensive campaign or system of advertising, and who markets his produce under a trade name or brand which he has made known and respected by the foregoing methods, has in such manufacturing business connected with such trade name or brand and its reputation, created a property, in the maintaining of which he has an interest; that he has a right to protect this property by reasonable means and provisions in the sale of portions thereof, or of the product, so that the purchaser will be bound to use such portions in such ways only as will not injure the seller's business.

DEFENDANT'S PRAYER NO. 43.

The defendant prays the court to instruct the jury that even though you should find that the course of dealing on the part of the defendant, Cudahy Packing Company, in requesting purchasers of Old Dutch Cleanser not to resell below certain prices did to some extent restrain interstate trade and commerce, the defendant, Cudahy Packing Company, would not be liable unless you should also find that such restraint was undue and unreasonable; and in determining whether it was undue and unreasonable, you are to consider whether (523) such course of dealing is injurious to the public and oppressive to individuals and was done with intent to defeat competition and create a monopoly.

DEFENDANT'S PRAYER NO. 44.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents and that by reason thereof the plaintiff lost profits on items other than Old Dutch Cleanser, you must not award to the plaintiff any damages on that account.

DEFENDANT'S PRAYER NO. 45.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, if you should also find that the plaintiff's alleged damage resulted from the plaintiff's inability and unwillingness to become a party to that arrangement and to make a profit on Old Dutch Cleanser like other distributing agents who were parties to the arrangement, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 46.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, unless you also find that the plaintiff's alleged damage was directly and actually caused by this ar-

rangement and not by causes unconnected with this arrangement, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 47.

The defendant prays the court to instruct the jury that you must in no event award to the plaintiff any damages for the period subsequent to May 12th, 1915.

DEFENDANT'S PRAYER NO. 48.

(524) The defendant prays the court to instruct the jury that you must in no event award to the plaintiff any damages for the period prior to November, 1914.

DEFENDANT'S PRAYER NO. 48.

(524) The defendant prays the court to instruct the jury that even if you should find that the defendant refused to sell the plaintiff Old Dutch Cleanser or discriminated in price against the plaintiff and that the plaintiff had thereby lost some profits which he otherwise would have made on Old Dutch Cleanser, you must, nevertheless, in arriving at your verdict take into account and allow for the possible reduced price which the plaintiff by his own contention might have sold such Old Dutch Cleanser for and the plaintiff's expense in handling such Old Dutch Cleanser and the profit the plaintiff has in fact made on Old Dutch Cleanser bought from other sources.

DEFENDANT'S PRAYER NO. 50.

The defendant prays the court to instruct the jury that the plaintiff's own admission in this case shows that the plaintiff had no call for Old Dutch Cleanser from the time the plaintiff ceased to be a distributing agent in 1914 until in or about November, 1914, and in considering the question of damages you will not go back to the latter date.

DEFENDANT'S PRAYER NO. 51.

The defendant prays the court to instruct the jury that the plaintiff cannot recover in this action unless it has established by a preponderance of the evidence, first,

that the defendant has done some act forbidden by the Anti-Trust Laws, and, second, that it has thereby been substantially injured in its business or property.

DEFENDANTS' PRAYER NO. 52.

(525) The defendant prays the court to instruct the jury that the plaintiff cannot recover upon an alleged violation of the Sherman Law, which prohibits any contract, combination or conspiracy in restraint of interstate trade or commerce, unless you shall find, by a preponderance of evidence, that the defendant has combined with one or more persons to prevent the plaintiff from purchasing Old Dutch Cleanser. The burden of proving such combination is upon the plaintiff and the mere fact that other jobbers in Baltimore or elsewhere declined to sell the plaintiff Old Dutch Cleanser is not, of itself, any evidence of such combination. The mere fact that the defendant, Cudahy Packing Company, requested other distributing agents to maintain the list price on Old Dutch Cleanser is not, of itself, evidence of such combination. The defendant, Cudahy Packing Company, had the legal right to decline to allow the distributing agents compensation to any jobber who sold Old Dutch Cleanser below the list price, and the mere fact that the defendant did so is not evidence of a combination in restraint of trade.

DEFENDANT'S PRAYER NO. 53.

The defendant prays the court to instruct the jury that the burden of proof is upon the plaintiff to show some real and actual damage to its business by reason of some unlawful act of the defendant, and unless it proves this damage by a preponderance of evidence the verdict should be for the defendant.

DEFENDANT'S PRAYER NO. 54.

The defendant prays the court to instruct the jury that mere speculation as to the possible profits of a mercantile business cannot be indulged in by the jury for the purpose of finding a verdict in damages. The damages which the law contemplates, and which the act of Congress provides for, must be substantial damages as-

(526) certainable upon the evidence presented in the case. There must be facts, transactions, actual evidence of some material and pertinent character relating to the business from which the jury can ascertain with reasonable certainty what damage has actually been worked to the business before any verdict in damages can be returned.

DEFENDANT'S PRAYER NO. 55.

The defendant prays the court to instruct the jury that if the evidence in the case in the matter of damages to the business of the plaintiff has not shown any real or substantial damage, apart from conjecture or mere speculation, then the plaintiff is not entitled to any compensation, and no verdict in damages should be rendered in its favor.

DEFENDANT'S PRAYER NO. 56.

The defendant prays the court to instruct the jury that the estimated future or anticipated profits of a commercial business are too remote, speculative and uncertain to warrant a judgment for their loss. Anyone who seeks to recover anticipated profits, must not only show the average sales over a period of time sufficient to create a presumption, but must also show the total expenses of every description, including not only the cost of the article, but the cost of effecting the sales including all the disbursements in the business in order to enable the jury to ascertain by facts and figures the net result.

DEFENDANT'S PRAYER NO. 57.

The defendant prays the court to instruct the jury that before you can arrive at any damages, you must first determine whether or not the plaintiff has been injured in his business or property by reason of any act of the defendant forbidden by anything in the anti-trust laws. The injury to his business or property must be real and substantial and based not on speculation but upon the facts and circumstances showing the nature and extent (527) of the injury. If the plaintiff's business has not been injured, he cannot recover merely because he be-

lieves that it would have been greater or more profitable except for the acts of the defendant.

DEFENDANT'S PRAYER NO. 58.

The defendant prays the court to instruct the jury that this is not a case in which you can find nominal damages for the plaintiff. If the plaintiff has failed to show that he has sustained substantial damages, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 59

The defendant prays the court to instruct the jury that even if you should find that there was any arrangement between the defendant, Cudahy Packing Company, and certain distributing agents or any discrimination in price against the plaintiff or any refusal to sell the plaintiff Old Dutch Cleanser as alleged by the plaintiff, and that the plaintiff had suffered damages in consequence of such acts or act, nevertheless, the only acts for which the plaintiff may recover anything in this action are such acts as are set forth in the declaration and as were done by the defendant or its agents before May 12th, 1915, when this action was commenced, and the plaintiff can not recover anything in this action for any damages which are the result of any continuance of such alleged agreement, discrimination, or refusal to sell, if you should find any such, after May 12th, 1915, when this action was commenced, or which are the result of the performance of any acts in furtherance of such alleged agreement, discrimination or refusal to sell, if you should find any such, after May 12th, 1915, when this action was commenced.

DEFENDANT'S PRAYER NO. 60.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangements between the defendant and its distributing agents, or some unlawful discrimination by the defendant against the plaintiff, and, that by reason thereof the plaintiff lost profits which he otherwise would have made on Old Dutch Cleanser, unless you are satisfied by definite and certain evidence how much Old

Dutch Cleanser, if any, the plaintiff could have sold, except for that arrangement; and at what price or prices, if any, the plaintiff could have sold such Old Dutch Cleanser, and how much of such Old Dutch Cleanser, if any, the plaintiff could have sold at the full price, except for that arrangement, and how much of such Old Dutch Cleanser, if any, the plaintiff would have sold at a lower price, except for that arrangement, you must not award to the plaintiff any substantial damages on that account.

DEFENDANT'S PRAYER NO. 61.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, or some unlawful discrimination by the defendant against the plaintiff and that by reason thereof the plaintiff lost profits which he otherwise would have made on Old Dutch Cleanser, unless you are satisfied by definite and certain evidence how much Old Dutch Cleanser, if any, the plaintiff would have bought, except for that arrangement, and what price or prices, if any, the plaintiff would have paid for such Old Dutch Cleanser, except for that arrangement, and how much Old Dutch Cleanser the plaintiff would have bought at the lower quantity prices, and how much Old Dutch Cleanser the plaintiff would have bought at the higher prices for smaller quantities, you must not award to the plaintiff any substantial damages on that account.

DEFENDANT'S PRAYER NO. 62.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, or some unlawful discrimination by the defendant against the plaintiff and that by reason thereof the plaintiff lost profits which he otherwise would have made on Old Dutch Cleanser, unless you are satisfied by definite and certain evidence how much Old Dutch Cleanser, if any, the plaintiff has bought from other sources than the defendant and what price or prices the plaintiff has paid therefor and how much Old Dutch Cleanser the plaintiff has bought at the quantity prices and how much Old Dutch Cleanser the plaintiff has

bought at the higher prices, you must not award to the plaintiff any substantial damages on that account.

DEFENDANT'S PRAYER NO. 63.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, or some unlawful discrimination against the plaintiff by the defendant and that by reason thereof the plaintiff lost profits which he otherwise would have made on Old Dutch Cleanser, unless you are satisfied by definite and certain evidence how much Old Dutch Cleanser, if any, the plaintiff could have sold, except for that arrangement, and how much it would have cost the plaintiff to handle such Old Dutch Cleanser, you must not award to the plaintiff any substantial damages on that account.

DEFENDANT'S PRAYER NO. 64.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, the burden of proof is upon the plaintiff to satisfy you as to the price at which in specific transactions the plaintiff, except for such arrangement, would have been able to buy Old Dutch Cleanser from other jobbers; and the measure of damages, if any, is the amount by which this price is exceed by the price at which the defendant offered to sell to the plaintiff the same quantity (530) of Old Dutch Cleanser.

DEFENDANT'S PRAYER NO. 65.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agent and that by reason thereof the plaintiff lost profits which he otherwise would have made on Old Dutch Cleanser, you must nevertheless, in arriving at your verdict take into account and allow for the possible reduced price which the plaintiff, by its own contention might have sold such Old Dutch Cleanser for and the plaintiff's expense of handling such Old Dutch

Cleanser and the profit which the plaintiff in fact has made upon the Old Dutch Cleanser bought from other sources and the profit which the plaintiff might have made had it bought from the defendant Old Dutch Cleanser at the prices actually quoted to the plaintiff by the defendant and had sold such Old Dutch Cleanser at the smaller quantity prices commonly paid by retailers generally.

DEFENDANT'S PRAYER NO. 66.

The defendant prays the court to instruct the jury that even though you should find that the defendant discriminated in price against the plaintiff and that the plaintiff thereby lost some profits which he otherwise would have made on Old Dutch Cleanser, you must, nevertheless, in arriving at your verdict take into account and allow for the profits which the plaintiff might have made had it bought from the defendant at the defendant's general list prices for quantities and at the defendant's general list prices for five case lots and glass.

DEFENDANT'S PRAYER NO. 67.

The defendant prays the Court to instruct the jury that if you find that the benefit according to the plaintiff in consequence of the refusal of the defendant to sell to (531) the plaintiff at the Distributing Agents' price, equalled or exceeded the loss of profits which the plaintiff suffered in respect of Old Dutch Cleanser, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 68.

The defendant prays the Court to instruct the jury that the duty rested upon the plaintiff to mitigate any damages which he may have suffered in consequence of not being able to buy of the defendant at the defendant's Distributing Agents' price; and that if the plaintiff, by buying at the General Sales price, could have made a profit, this profit must be considered in mitigation of the damages to the plaintiff.

(532) Mr. BOWIE: I presume it is proper at this time to note an exception to the prayers?

The COURT: I will make a general statement on that.

Gentlemen of the jury, this has been a case, it seems to me, exceedingly simple, but which has been very troublesome to follow, I think. Counsel, appreciating from some standpoint that the case is quite an important one, and being very well learned in the law, have felt it their duty to their clients to put at their client's services in this case all their learning, with the consequences that in the discharge of their duties to their clients it has so turned out that it has been almost impossible for any of us to follow a story of any one witness very long because of the incidental questions as to admissibility and what-not that were raised. And then counsel have felt it their duty to put their views of the law into writing, somewhat voluminously. I suppose I have a dozen prayers on one side and sixty-eight, I believe, on the other. In that view of the case, as I feel myself fairly well posted in the law, I made up my mind to reject all the prayers on both sides. As to the side with the sixty-eight prayers I can only say that I do not pretend to have examined them all or even very many of them. I do not feel that in the limited time that was available in the course of the trial, that I was under obligation to do so. After I have finished my charge, if there are any special points that either side does not think have been sufficiently covered, if counsel will bring them to my attention by a request to charge, I will be very glad then to consider them. But it is impossible to act on sixty-eight propositions of law in such a narrow compass of time. Many of them will be dealt with, adversely or favorably, in my charge, and those that are not dealt with can be called to my attention and, if I consider them favorably, I will charge them.

(533) Mr. MONTAGUE: I would just ask your Honor to say to the jury that the sixty eight prayers that were handed to your Honor were given to you yesterday before the afternoon session.

The COURT: That is perfectly true, but counsel is also very well aware that there were other things connected with this case that required the attention of the Court. There is not any case, unless it were a contract case involving a trial of one hundred separate suits in one, which would justify sixty-eight prayers. There were certain peremptory prayers on each side that you can take your exception to at once, of course. Each side has

asked that I instruct the verdict, and I have refused those and you can have an exception to that refusal at once.

Which exception was taken by defendant, and defendant now prays the Court to sign and seal this its one hundred and thirty-seventh bill of exceptions, which is accordingly done, this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

THE COURT: I may say before I get into the actual review of the case that the defense asked me, in connection with an incident that happened on the first day, to say something to you. I see that counsel took what was said too seriously. I was surprised at the time because I had nothing in mind which, if understood, would have hurt anybody's feelings. But I find in looking over the stenographic notes, that it could be construed so as to be more or less offensive. It was that incident which occurred when counsel for defense was cross examining, Mr. Frey being on the stand, and counsel was trying to get in some part of all of a long communication that Mr. Frey had published in some newspaper somewhere, and he was asking (524) various questions of Mr. Frey about it, and in the course of asking the questions he was reading sections of the article, whereupon he had been howled over two or three times and Mr. Smith on the other side objected that counsel was doing what counsel very often do, there is no doubt in the world about that, trying to get matters before the jury by reading them or putting them in the form of a question in spite of the fact that the court was going to rule them out. That often has occurred and I guess there are very few members of the bar who have not done it. So Mr. Smith objected on that ground. Well, as I say, that often is done; I did not pretend to pass upon whether counsel was unconsciously doing it at that time or not, but I felt the best way to dispose of it was to make light of it as I did and I said to counsel that anything of that kind that is being done the jury will see through it and punish it, or something of that kind. I saw that counsel took it much more seriously than the court had any intention that it should be taken.

JUDGE'S CHARGE TO THE JURY.

As you know, gentlemen, this case is brought under the Anti-Trust Acts. Those Acts forbid certain things, and they further says that if any one is injured by the doing of some one of those forbidden things, he may bring a suit at law to recover for the damage so done.

The plaintiff's amended declaration contains two counts. The first alleges that the prohibition against which the defendant is said to have offended is that imposed by the first Section of the original Sherman Act which prohibits contracts, combinations and conspiracies in restraint of interstate trade.

The second count sets up a breach of the Second Section of the Clayton Anti-Trust Act, passed October 15, 1914. This Section makes it unlawful for any person engaged as defendant was, in interstate commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, where the effect of such discrimination may be substantially to lessen competition. I direct your attention to the allegations in the (535) first count. I will not deal with more or less undisputed things alleged in the count. The defendant is engaged in interstate commerce and the plaintiff is engaged in interstate commerce; those are matters which (536) have been proved and are not in controversy here. So I will pass to the matters which are more vital because disputed, more or less seriously. The plaintiff says there was a combination in restraint of trade, inspired and brought about by the defendant, and to which defendant was a party. It says that the particular combination of which it complains was one to prevent any jobber from selling to a retailer Old Dutch Cleanser below certain prices designated by the defendant, and it says it was injured by an act done in furtherance of such combination, viz., by refusal of the defendant to sell to it Old Dutch Cleanser, because it had in fact refused to become a party to such combination.

Ordinarily no man has a right to complain because another man will not sell him something that belongs to that other man, nor does he ordinarily get any better right to complain merely because such other will sell to other persons the kind of things that the one complaining wants to buy, but will not sell them to the complainant. Of course this rule is not universally true. As to certain

sorts of services or accommodations, such as those of a common carrier, keeper of public elevator, inn, a company that conducts a telephone or telegraph service, etc., in which one holds himself ready to serve the public, he must serve all the public, and may not for any arbitrary reason of his own refuse to serve any particular member of the public. But those cases are exceptional and have nothing to do with the ordinary sale of goods, wares and merchandise. There, in the absence of any statutory prohibition, any man may pick and choose as he sees fit among would-be customers. I say in the absence of statute, because that is all that is here necessary to say. Whether under any circumstances Congress can constitutionally limit this right, it is not necessary in this case (537) to inquire. But Congress has not done so, and indeed, in its last enactment on the subject it says that nothing contained in the Act shall prevent persons engaged in selling goods, wares and merchandise in commerce from selecting their own customers in *bona fide* transactions, and not in restraint of trade. Defendant has asked me to say to you or at least I assume it argues among other things, that it has an unquestioned right to stop dealing with a jobber for reasons sufficient to itself, and that it and any other manufacturer has an unquestioned right to deal with any jobber who handles its product, and where it distributes its product through jobbers, upon whose methods of business it is largely dependant, for the sale and distribution of its product, it has a right to choose the jobbers through whom it will sell and distribute its products;

Now all these statements are true. Defendant further asks me however to say that the reasons which influence a manufacturer in such cases to choose between jobbers, or to stop dealing with a particular jobber, are of no consequence. Ordinarily this is true. It is always true except under circumstances which I shall hereafter specify. The reasons why a dealer should have a right to decline to sell to a particular man, and should not be called on to explain or defend his actions in so doing, are obvious to every one. Certainly to every business man. There are a great many such reasons. You may doubt the credit of some one who wants to buy from you. You could not prove that his credit was not good, and you would have no right to say to anyone that you did not think it was. Perhaps you could not define to yourself

just what were the causes that led you to suspect his credit. Perhaps five times out of six it would have (538) turned out you could have sold him safely, but the loss which you would incur on No. 6, had you sold him, would have been several times the aggregate profit you would have made on sales numbers one to five. And then, there are other men whose financial responsibility is unquestioned, but with whom you think it might not be well to deal. No matter how they get on with other people, you and they do not pull it off comfortably, and business relations between you and them you fear, will never be worth while; and then there are others who can pay their bills and who do pay them when there is no way of getting out of it, with whom you do not want to deal. The sort of people who on a falling market always object that the goods are damaged, short in quantity, etc. Most of us come across some people whom experience has taught us it is well to keep clear of. After a while we come to the conclusion that if we lend them a dime on the collateral of a gold dollar, we will have reason to regret it. Therefore the law is, and with some very few limitations, I presume always must be, that whether a man will sell another or not is a matter for the seller to determine for himself.

Absolute, or nearly absolute as the right to select one's customers may be, it is doubtless no more absolute than our own rights, such as our right to use our capital, industry and our brains to the best advantage. I take it, however, and I shall so instruct you that the law is, no man may willfully and knowingly use his money, his industry, his brains, or his right to pick and choose among his would-be customers, to induce or bring about a violation of law; that is to say, to do or procure the doing of some act which the law forbids.

(539) Now, in this case, plaintiff says that the law does forbid any combination or agreement to maintain the price of any article. One must bear in mind what that contention is. It has nothing whatever to do with the right of the defendant to fix the price at which it will sell its goods to any one. One of the purposes, perhaps one of the principal purposes of the Sherman Anti-Trust Act, was to prevent the growth of monopolies. Now, there is in this case no question as to defendant's monopolization of cleansers. Plaintiff does not contend that it cannot get cleansers, but its complaint is limited to the

charge that it cannot get Old Dutch Cleanser. The name Old Dutch Cleanser is a purely arbitrary one, I presume. It is a trademark under which defendant sells its cleanser. No one other than the defendant, apparently, has the right to manufacture an article and sell it Old Dutch Cleanser. By the nature of things, therefore, defendant has a monopoly in the original production of Old Dutch Cleanser, because Old Dutch Cleanser after all means nothing more or other than the cleanser made by defendant. Defendant, being the lawful owner of the cleanser, may sell it at whatever price it can induce anyone to pay for it. But Congress has also prohibited combinations, contracts or conspiracies in the restraint of interstate trade. It does not mean that all contracts or combinations which restrain competition are necessarily prohibited by statute. The statute itself is to be read, as the Supreme Court has told us, in the light of reason, but there are certain kinds of contracts and combinations which the Supreme Court, as I understand it, has held to be contracts in unreasonable restraint of trade, and if a contract or combination belongs to that class, the fact that in a particular given case the Court or jury may (546) think that the result of the combination or contract would on the whole be beneficial rather than harmful, will not justify it, and as I understand the decision of the Supreme Court, any agreement having for its sole purpose the destruction of competition, and the fixing of prices is injurious to the public interests and void. The sole purpose of the agreement or combination must be the fixing of prices. That does not mean that the parties to it may not expect, and for that matter reasonably expect to derive various benefits from such fixing and maintaining of prices. It does mean that the sole purpose of the agreement itself is to maintain prices. Now, no one has a right to be a party to such a contract or combination, and one who does become a party to it has no right to do anything to further its object, whether the thing so done would or would not otherwise be within its clear right. One who does something to further the illegal object, and in so doing injures and intends to injure some one else, has done wrong, and if that something is done, in the promotion or furtherance of a contract or combination in restraint of inter-state trade, he has done

something for which the person injured may require him to account for damages.

Now clearly under this statement of the law, the defendant cannot be held liable under the first count, unless it was a party to a contract or combination or conspiracy to fix and maintain prices. Defendant denies it was a party to any combination, contract or conspiracy for such purpose. It says it merely notified the jobbing trade what prices it thought were the lowest at which jobbers would resell its product and make enough return thereon to make it worth their while to push the sale of (541) such product. It is admitted by the plaintiff that with reference to most of the jobbers at least, there was no written and signed agreement on the subject, and none couched in any formal or express terms, although it is in evidence that the defendant, suspecting the firm of Frey & Thomas of York, Pennsylvania, of cutting prices, did ask them to enter into a formal written agreement to maintain prices, which draft of agreement has been offered in evidence, but in that case no agreement was actually formed because Frey & Thomas declined to enter into it, and according to the testimony of Mr. Thomas, they have not been able to buy O. D. C. from defendant since, except at the price at which it was usually sold to retailers.

A number of jobbers here in Baltimore have testified that they have for years been purchasers of Old Dutch Cleanser from the defendant, and that they had entered into no agreement on the subject, and some of them at least testify that they did not feel under any obligation, either moral or otherwise, to maintain such prices. Many of them said that they always had maintained them, and some of them who so said, did so because they would not have handled the goods at all if they could not have resold them at a figure at least as high as they received for them, and others give as an additional reason that they are in the habit of respecting manufacturers' wishes as to resale prices. Some of them say that they do not feel that they would be dealing quite fairly with the manufacturer, or with their competitors if they did sell below the resale prices named by the manufacturer.

There is no question that the defendant, from time to time, issued circulars to the trade, in which such circulars appeared statements like the following:

(542) "Our business and especially the extension of the trade in these articles depends mainly upon their success in the market, and we therefore consider it essential to make every fair effort to assure to each merchant a steady and reasonable profit. Uniform and fair jobbing and retail prices and trading provisions accomplish this, and we further expect by such uniform sales promotion to gain a practical benefit in increased business to ourselves, to the jobber and to the retail merchant, and to merit their united appreciation, good will and support."

And then in rather prominent type:

"In relation to wholesalers supplying one another. Important. It is the intent of our selling provisions governing distribution from jobbers' stock (or drop shipments from factory for account of jobber) that the prices provided for different quantity lots, are to govern without exception. If wholesalers should sell other wholesalers or distributors at an intermediate price between jobbers' cost and the fixed retail price, special prices might thereby gradually be extended to semi-jobbers to the ultimate restriction of our business. Any sales by jobbers at special prices would have no other effect than to enable the purchaser, whether jobber, large retailer or otherwise, to demoralize prices and disturb the entire business in these products. To prevent this (and the following appears in red type) it is therefore essential that (543) we be the only ones to decide who is to buy at wholesale prices (there the red ink ends) and it is for that reason the jobbers' sales to other jobbers and distributors should be strictly at our published retail list, or in other words, at the same price at which the jobber would sell to any retailer. This is a matter of so much importance that we deem it essential to bring it prominently to your notice by this means."

And then in red type in the same circular appears:

"Old Dutch Cleanser and Dutch Hand Soap will be sold at jobbers' prices to only such jobbers as strictly observe the retail selling prices in this list in all of their resales, whether to their regular retail trade or to other jobbers and distributors."

The quotations I have made are in evidence in circular dated October 1, 1912. There is another one in evidence dated January 1, 1910, but it appears in respects mentioned to be substantially, I think, verbally identical with the one of October 1, 1912. These quotations are from a circular which is called "Selling Price to Retailers." The same notice appears in a circular marked "Jobbers' Cost" issued by the defendant under date of January 1st, 1910. On April 6th, 1914, there is in evidence a circular issued by defendant and called "Distributing Agents' Compensation." In this circular it is stated:

"For the most practical and economical merchandising and distribution to the trade we appoint distributing agents, the same being taken from business houses doing exclusive jobbing trade. To insure the availability and (544) success of their work, and of our important and constant national advertising, as well as in the interest of the trade, uniformity and equality, as to terms, delivery and price is essential. It is therefore required of our distributing agents that they fully co-operate with us in this direction, as per terms, conditions and prices laid down in our published General Sales List. The goods that we deliver to our distributing agents are for sale to our mutual retail trade, and is not intended that our distributing agents sell same to other wholesalers, as we are prepared to distribute through them in all cases on the terms and conditions of our published Sales Provisions. We especially desire to point out that this remuneration to our distributing agents may not be given away by them wholly or in part, to any class of trade, either jobbers, semi-jobbers, retailers, or consumers. All quotations, bids, sales and invoices should be at a rate not lower than laid down in our Published General Sales List. Quantity orders should not be booked or deliveries made, excepting to one buyer at one time, and distributing agents should not entertain orders where pooling is known or probably exists. Discount: Not more than two per cent for cash for remittance received within the cash discount period should be allowed. Cash discounts should not be allowed from quotations, bids or orders, nor should it be deducted from invoice on the assumption that the customer will pay cash."

(545) There can be of course, no question here that the defendant did all that it could to make dealers believe that it would refuse to sell them except at the price at which any retailer could buy, if they did not in all respects maintain the price list that it fixed, and it is in evidence that it did refuse to sell jobbers whom it believed were not maintaining these resale prices, and on every bill sent to a wholesaler by the defendant there appears to have been stamped a notice that "All your quotations, bids, sales and invoices for Old Dutch Cleanser either to jobbers, semi-jobbers, retailers or consumers, should be at a rate not lower than laid down in our published General Sales List."

I should say a word here perhaps, about the phrase "distributor" which appears, some time between October, 1912, and April, 1914, to have been substituted by defendant in advertising literature for the phrase jobber. So far as the testimony has disclosed, and so far as any of the jobbers who have testified are concerned, the change was a change in name only. The goods were sold to so-called distributing agents just as they had been sold to jobbers, and I do not think you need pay attention whatever to such a change of name. It further appears from the testimony that defendant did sell its goods to substantially all the wholesale grocers of Baltimore. There were a very few exceptions, and the reasons for them you have heard. It sold for years to the plaintiff and it stopped selling plaintiff at the prices at which it had been selling to plaintiff and at which they continued to sell to the other jobbers in Baltimore to whom they had previously been selling, and it is perfectly clear from Mr. Frey's testimony, and from the correspondence that passed between him and the (546) defendant's agents, that no other complaint was made against him, except that he had cut the re-sale prices. You may reasonably conclude that if there had been any other reason whatever for cutting him off, defendant would have offered evidence to show the existence of such reason, but none such was offered. I think you will be entirely justified in finding that the refusal to sell, if you shall find a refusal, or a discrimination against Frey, if you regard what the defendant did as a discrimination rather than a refusal, was due entirely to defendant's belief that Frey had cut prices and was likely to continue so to do. Was such cutting off, and

if you shall find that he was, and such was the reason for their refusal to sell him at less than the price at which sales were made to retailers, you will have to inquire whether such action was taken by them in furtherance of the combination to maintain resale prices, if you shall find the existence of such combination. If one large wholesale jobber cuts prices on any considerable scale, quite obviously his competitors, the other wholesale jobbers, will have to do the same or cease to deal in the article. If there was any such combination, you may hold that it was necessary for its maintenance that defendant should in some way stop any large jobber from cutting prices, if it could, and you may therefore have little difficulty in holding that it was for the purpose of maintaining the re-sale prices fixed by it that it dealt with the plaintiff as it did.

In point of fact, there seems to be little room for controversy as to this first count on any possible question, except whether there was a combination, and as to whether what the defendant did with reference to Frey (547) was a refusal or mere discrimination. I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act. Of course you understand that the plaintiff must make out its case, and must satisfy you by a fair preponderance of the evidence that its case is made out, and if your mind on any issue in the case necessary to your determination is left so in doubt that you do not feel that the evidence preponderates on one side or the other, the defendant must have the benefit of it.

In this case, however, there is not so much dispute as to ultimate facts perhaps, as there is to the inference which can reasonably be drawn from the facts. Now the defendant say it never did refuse to sell plaintiff. It certainly did always offer to sell him Old Dutch Cleanser at the price at which, according to its sales plan, wholesale

grocers like himself, resold the Old Dutch Cleanser to retailers or other persons. Plaintiff says that was intended to be a refusal, and in fact was so. Quite clearly if defendant had said to the plaintiff that he could have Old Dutch Cleanser at \$5.00 a case it would have refused to sell him because it would have known perfectly (548) well that the plaintiff could not pay such a price for that article to sell again, so that there may be a refusal which takes the form of the naming of a price, which the person naming it knows to be prohibitory. Now in this case defendant did offer to sell plaintiff Old Dutch Cleanser at a price at which, buying in large quantities, it could if it had sold in very small lots, had made some profit, for the re-selling price to retailers in one case lots is \$3.40 and in over 250 case lots it was \$3.20, which latter price was that which defendant quoted to plaintiff. It will be for you to say, under all the facts and circumstances of the case as they are in evidence, whether you believe that the defendant in naming the price it did to plaintiff desired and intended to prevent him from obtaining goods, or whether it merely sought and intended to get from him a higher price for its goods than it was willing to sell them for to other persons in like case. If you think its purpose was to keep him from getting the goods, it was a refusal. If you think its real purpose was to sell him the goods, but at a higher price than it charged others in like cases, it would be a discrimination.

If you shall find a refusal in furtherance of a combination to maintain prices, you should find for the plaintiff under the first count, and it will then be unnecessary for you to give any attention to the second count.

I should say, and perhaps I have already said it, that a combination, contract, agreement, conspiracy, or whatever you choose to call it, does not have to be made in any formal way. If you know that I want you to do something and you know I will not deal with you unless you do do that something, and you keep on doing it, there (549) may be an agreement between us to do that very thing, though never a word has been said. In other words, you will understand that if the persons were actually, deliberately, each knowing the purpose of the other, co-operating and working together to obtain the same result, then you can find that the agreement, or whatever you choose to call it, existed.

The second count charges the violation of the Clayton Act, which makes it unlawful for any person engaged in commerce in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, where the effect of such discrimination may be to substantially lessen competition, or tend to create a monopoly in any line of commerce. There is no question that defendant did charge plaintiff more for Old Dutch Cleanser than it charged others in like line of business with plaintiff, and if you shall find, as from the evidence you may very well find, that the intent of such discrimination was to maintain the resale prices fixed by the defendant, you may well find that the effect of such discrimination was to substantially lessen competition, as you may find in view of the repeated warnings given by defendant in its literature that the discrimination against plaintiff would operate to make other jobbers and wholesalers fearful to indulge in any competition in price in this article.

If you shall find a refusal in furtherance of a combination to maintain prices you should find for the plaintiff under the first count and it will then be unnecessary for you to give any attention to the second count. In determining whether or not there is a combination of the kind I have described to which the defendant was a party, (550) and whether or not its refusal to sell plaintiff was in furtherance of such combination, you must not allow your judgment to be influenced by any economic or business views you may hold or any doubts that you may have as to the wisdom of the law. If you went into that field you might have to go very far indeed. One of the great problems of the modern day, and perhaps of all days, is preventing waste, in the process of getting goods from their original purchaser to the ultimate consumer. The problem is complex and difficult in the highest degree. Such questions cannot be fought out in individual trials, for in the nature of the case there would be almost as many conclusions as there are different cases tried. We must apply the law as it is, and so far as you are concerned, the law as it is you must take to be what I say it is. If I am wrong as to what the law is, the Appellate Court will correct the error. If I am right as to what the law is, and the law itself is an unwise one, Congress alone can change it. Under your oaths of office you must enforce the law as the law now stands.

If you shall reach the conclusion upon a preponderance of the evidence that the defendant was a party to such combination and that to further its object it refused to sell the plaintiff Old Dutch Cleanser, for such purpose, then it will be your duty to inquire what damage plaintiff actually suffered as a result of such refusal.

If plaintiff had been able to obtain Old Dutch Cleanser from the defendant at the price at which other persons in like line of business in Baltimore had obtained it, the evidence indicates that he would have been able to have resold it to his customers at a profit. He lost that profit because he could not get the product from (551) defendant, or lost part of the profit because he could not get it at a price as low as that paid by others. Now, how are you to determine how much Old Dutch Cleanser the plaintiff would have sold if he had had the chance to sell any? Well, during the three years preceding the time at which defendant took plaintiff off its preferred list, as it calls it, plaintiff had bought and substantially sold some 6,653 cases, or an average of over 2,200 cases a year. The total volume of its business in all lines during that time averaged something like One Million, three hundred thousand dollars a year, and during the period intervening between the time defendant took the action complained of and the institution of this suit, defendant was doing a business of perhaps one million and a half a year. You may not unnaturally conclude, in view of the high public favor in which the evidence seems to show that Old Dutch Cleanser is held, that plaintiff's sales of Old Dutch Cleanser would have increased proportionately to that of the rest of his business. That is to say, that if plaintiff sold something in excess of 2,500 cases a year of Old Dutch Cleanser during the period elapsing between the cutting off and the bringing of this suit, somewhere upwards of 3,000 cases, and if you shall so find, and you are not bound to, it is entirely in your sound business judgment, you will have to determine what profit plaintiff would have made on such volume of business. He paid about \$2.95 a case for it, less 2% discount. There were some 103 cases which he resold at practically no profit, and he claims he sold most of the other 6,653 cases at \$3.40 a case. He admits that there was some cutting. He thinks it was made with only five customers. He is not able to tell what quantity these five customers took. As to them it was sold as low

as \$3.15. He has said he sold almost exclusively in one (552) case lots, but defendant has produced a large number of orders which tend to show that he may be mistaken as to the small proportion of five case lots ordered by his customers. However, that may be, the testimony would seem to indicate that his average profit on what he sold was not more, and you may think if he had been able to obtain it, would not have been less than Twenty Cents a case, which on 3,000 cases, which you may estimate as the quantity he would have sold between the time he was cut off and the bringing of this suit, if he had had the chance to make such sales, would be \$600. If you think that he would have obtained a higher average profit, you will increase the estimate of his damage accordingly. Of course if you think his profit would have been smaller, you will cut it down. After you have ascertained the actual damage, the law requires you to multiply it by three. If, for example, you find that the plaintiff's actual damage was \$600, and decide that he is entitled to recover therefor, you multiply that \$600 by three, and return a verdict for \$1,800.

This suit was brought in May, 1915, two years ago. Plaintiff thinks it is entitled to damages not only for the period before the suit was brought, but for these two years. The question of law is a close one and I shall ask you therefore in your verdict, if you shall find for the plaintiff, to find that its damages up to the date of the bringing of the suit were so much, say for illustration \$1,800, but only for illustration, and that for the two years since the bringing of the suit, in which time you will find he would have sold between five thousand and six thousand cases, that his damages were so much. In each case, you understand, you first ascertain what the (553) actual damage is, and multiply it by three.

Now, gentlemen, while you are to take the law from me, there is a tribunal in Richmond, and ultimately in Washington, that corrects very many blunders in the law that we judges make. I am speaking *ex cathedra* now and for your purposes I am infallible. But on all questions of fact you are the sole judges. If I have intimated any opinion upon the facts in this case, those intimations are not binding upon you except in so far as they commend themselves to your judgment. The facts are entirely for you to decide, and the responsibility rests upon you.

Now, is there anything, Mr. Baker, besides what you have excepted to that you want charged? Are there any points that you think I have not covered?

MR. BAKER: Your Honor used the words "sole purpose"—

THE COURT: I quoted the language of the Supreme Court.

MR. BAKER: We want an exception to that. I have examined carefully the language of the Supreme Court and I find that the evidence was in that case that it was for the sole purpose, but the words "sole purpose" in that case were used because that was the record.

THE COURT: I have said to the jury, and I think I have made that perfectly plain, that in this particular case, or in any case they are not to take into account the effects, good or bad, which the person who fixes the prices thinks will follow the fixing of the prices; if the thing itself that he does in the way of cutting off the man is done for the sole purpose of keeping up the price, then it is a violation of the law. The fact that there are a hundred beneficent purposes that the person who does it thinks will follow from the keeping up of the price, that is immaterial.

MR. BAKER: Now on the question of damages we except on the ground that your Honor has limited the right of recovery when the jury as a right to take into (554) consideration the interruption of the business of the plaintiff by this refusal.

THE COURT: The interruption of the business in any other respect than in dealing with Old Dutch Cleanser, do you mean?

MR. BAKER: No.

THE COURT: The mathematical calculation is made for the jury simply for illustration and to aid them in determining what his loss would be. I do say to them, as a matter of law, that they can not allow him any damages except to compensate him for the profit he would have made on the sale of Old Dutch Cleanser if he had been able to get Old Dutch Cleanser to sell. Now do you differ from that proposition?

MR. SMITH: And multiply by three?

THE COURT: Of course.

MR. BAKER: There is another element of damages in the case and that is the fact that these missionary agents

were going around and attempting to divert business from Frey by taking Frey's orders to other people.

The COURT: Remember, Mr. Baker, that that diversion was not attempted until after they cut Frey off. Now I have said to the jury that they shall find what number of cases of Old Dutch Cleanser Mr. Frey would have sold if he had had it to sell, and then they are to ascertain what profit he would have made on those cases which he would have sold, which profit he did not make because he could not get it.

Mr. BAKER: I want to make my exception perfectly clear. The Circuit Court of Appeals said in their decision that we were not allowed to recover for the loss of any orders that we might have lost by not being able to furnish Old Dutch Cleanser when demand was made upon us, that is the orders for other goods, but the Circuit Court of Appeals or no court has decided that we are not entitled to recover damages on account of the missionary agents of this company going to retailers here and when an order was given to Frey to divert that order (555) from Frey, no court has said that we could not recover damages for loss in our business by reason of that fact.

The COURT: I find nothing in the evidence that would justify me in this particular case in allowing anything more than I have allowed. It is for the jury to determine the number of cases, if they can and as far as they can, and the number of cases of Old Dutch Cleanser Frey would have sold and what profit he would have made on each case and ascertain his actual damages in that way and multiply them by three.

Mr. BAKER: In talking about the damages, the jury might believe that the sales that we have not been able to make since the suit and down to the present time of trial might be by reason of the cutting off in February, 1914.

The COURT: I thought we were to have a separate verdict on those.

Mr. BAKER: I understand that, but my proposition is this—

The COURT: You want to mix them up?

Mr. BAKER: No, sir, I do not want to mix them up, but I did not want the jury to think it was a mathematical calculation of what cases were sold down to the date of the trial, because we might have been so injured in our

business that the cases we might have sold after that date might be included in that verdict. That is the proposition. Your Honor will show an exception to that?

THE COURT: Very well.

MR. SMITH: If your Honor pleases, those portions of your charge in which you speak about a person not paying his bills, or his credit not being good, or that the people can not get along sometimes together, can not pull it off well for one reason or another, and where a man on a fall in market will get out of accepting delivery of goods where he can, men who would not be willing to lend money, ten cents on the collateral of a gold dollars, I will ask your Honor to make it plain to the jury that there is no evidence in this case that that has any reference to Mr. Frey.

THE COURT: Not at all, there is not the shadow of evidence in this case that the defendant either refused to deal with Frey, if you find that he did so refuse, or discriminated against Frey for any other reason in the world except their belief that Frey was cutting prices. I explained that to make clear why the law is as it is.

MR. SMITH: Your Honor has said that Congress has not limited the right of a person to select his own customers; I think you have not made it quite clear that Congress has made it clear that a man can select his own customers where he is not doing that to bring about a restraint of trade.

THE COURT: No man may do anything, as I understand it, however laudible it may be, where his purpose in so doing is to restrain interstate trade or to promote a combination or agreement in furtherance of any such restraint of interstate trade. Now, Mr. Montague, have you any points to bring to my attention.

(557) MR. MONTAGUE: I respectfully except to so much of your Honor's charge as summarized the testimony of Mr. Thomas and the Baltimore wholesalers in respect to their relations with Cudahy.

THE COURT: Well, what is the matter with Thomas first?

MR. MONTAGUE: I take exception to your statement that he said that he was not able to get any more Dutch Cleanser from us.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the de-

fendant now prays the court to sign and seal this its one hundred and thirty-eighth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: (Immediately after the last statement by Mr. Montague: I said except at such prices as the retailer gets.

Mr. MONTAGUE: I take exception to that and also to the statements that you made in respect of the witnesses Schwab, Banghardt and Edgerton and those other witnesses whom I put on in respect of their motives and purposes as regards their selling price of Old Dutch Cleanser.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and thirty-ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: Those are all questions of fact. The jury heard the testimony. That is the impression made upon my mind by that testimony, but the jury is free to take any other view they wish.

(558) Mr. MONTAGUE: I note an exception to that.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and fortieth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

MR. MONTAGUE: I also except to so much of your Honor's charge as refers to circulars, price lists and papers which had been superseded prior to the transactions referred to in this complaint.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and forty-first bill of exceptions, which is accordingly done this 10 days of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: (Immediately after the last statement by Mr. Montague): If the jury find that they have been superseded, yes, I read one that was of April 6, 1914, and the next one of October, 1912, and it seemed to me, though it is for the jury to say as a matter of fact, that there had been no change in that system from the first of January, 1910, until April 6, 1914.

MR. MONTAGUE: I except to that statement.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal, this its one hundred and forty-second bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(559) MR. MONTAGUE: I respectfully except to so much of your Honor's charge as related to your comments on distributing agents, the term distributing agents.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and forty-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully

and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: (Immediately after the last statement by Mr. Montague: What evidence is there that there was any change outside of the change of name?

Mr. MONTAGUE: I except to the imputation which you conveyed to the jury.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and forty-fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: (Immediately after the last statement by Mr. Montague): I made no imputation except to say what I believe to be the fact, that there is no line of evidence to show in this case that when they changed from the word "jobber" to "a distributing agent" that was anything except a change in name.

Mr. MONTAGUE: The characterization of the purpose is one entirely for the jury, without the characterization of your Honor, with all due respect to your Honor. I also except to so much of your Honor's charge as stated that there was no other cause for Frey's being quoted the price of \$3.20 by the Cudahy Packing Company than the fact—

(560) The COURT: If there is any other, you are free to call the jury's attention to it. It has escaped me in the testimony if there is any.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and forty-fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully

and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

MR. MONTAGUE: I respectfully except also to so much of your Honor's charge as was given under the illustration which you used to define an unlawful discrimination within the meaning of the Clayton Act.

THE COURT: What do you refer to there?

MR. MONTAGUE: I might illustrate that: You said that it might be possible for the jury to find that in quoting a price of \$3.20 the intention of the Cudahy Packing Company was not to sell any—

THE COURT: But you have not made your exception in the right way. That has no reference to the Clayton Act discrimination, that has reference to the Sherman Act.

MR. MONTAGUE: Then I except to that.

THE COURT: You may.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and forty-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(561) MR. MONTAGUE: I respectfully except to so much of your Honor's charge as gave direction to the jury in respect of their form of verdict on the amount and to have the jury return verdict in that form as not fair under the issues as they have been presented in this case.

THE COURT: Why not fair?

MR. MONTAGUE: I consider it unfair because this statement of separating and calling for a return of different verdicts for different periods of time is not a proper way of asking the jury to make a finding in a complaint of this kind, which calls for damages as the result of two particular acts, and that their return must be for one verdict or the other on one count or the other.

THE COURT: Now, Mr. Montague, I am not going

to do what you want simply because by doing the way I do it it is easier to correct any mistake that might be made on either side afterward and escape the necessity of going over all this thing again. It is not necessary and it is not wise to try cases so that such a result may happen. You may have your exception.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and forty-eighth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. MONTAGUE: I also respectfully except to so much of your Honor's charge as discussed and commented upon the defendant's alleged refusal to sell.

The COURT: I don't know what you mean by that.

Mr. MONTAGUE: You have discussed the possibility that the jury might find in this case a refusal by the Cudahy Packing Company to sell Old Dutch Cleanser to the plaintiff.

(562) The COURT: That is the same thing you have already excepted to a moment ago in your exception about my illustrations.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and forty-eighth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

(563) Mr. MONTAGUE: I except also to so much of your Honor's charge as stated in substance that had the defendant refused to sell the plaintiff that would have constituted a violation of the Anti-Trust Laws.

The COURT: If he refused to sell it with the purpose of furthering a scheme to maintain prices.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and forty-ninth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. MONTAGUE: I would also respectfully except to that on the ground that no state of facts can be found upon which to base it.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and fiftieth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

Mr. MONTAGUE: I also respectfully except to so much of your Honor's charge as related to contracts and agreements to fix prices on the ground that there nowhere appears that there was such a contract or agreement or combination entered into in the present case, and on the further ground that unless it be shown that such an agreement or combination or contract was unreasonable and prejudicial to the public interest, it cannot constitute a violation.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its (564) one hundred and fifty-first bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The Court: (Immediately after the last statement

by Mr. Montague): I say that the Supreme Court has decided that any agreement to maintain prices is itself absolutely in restraint of trade and unlawful.

Mr. MONTAGUE: I also respectfully except to so much of your Honor's charge as in substance stated to the jury that there was no ground for Frey & Company receiving a price at \$3.20 except that—

The COURT: I said there was nothing in the evidence to show it.

Mr. MONTAGUE: On the ground that the evidence does show, as appeared from the statement particularly of the witness Sonnchill, that there was between Mr. Frey on the one hand and Cudahy people on the other, a very considerable difference as to the quantity of the orders and the support given by Frey.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and fifty-second bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

The COURT: (Immediately after the last statement by Mr. Montague): The jury can take that into account if they think that is serious.

Mr. MONTAGUE: I respectfully except to so much of your Honor's charge as related to any circulars and letters which your Honor has read on the ground that it nowhere appears that any dealer ever followed the suggestions contained in any of the defendant's literature (565) except when, independently of this suggestion, the dealer's own desire impelled him to observe the prices which were there suggested and to obtain for himself the profits which these sales would yield him.

The COURT: You are perfectly free to argue that to the jury.

Mr. MONTAGUE: I take an exception.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the de-

fendant now prays the court to sign and seal this its one hundred and fifty-third bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

MR. MONTAGUE: I also respectfully except to so much of your Honor's charge as indicates that an unlawful contract and combination or conspiracy or understanding is shown where it appears that in the absence of an express obligation some dealer, responding to a suggestion from Cudahy Packing Company, may have sold at the prices mentioned in its literature.

THE COURT: All a question of fact for the jury. All I can say on such questions is that the jury, when they come into this jury box, I do not suppose, leave their common sense behind.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and fifty-fourth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

MR. MONTAGUE: I except to so much of your Honor's charge as dealt with the plaintiff's gross business and the alleged increase in the plaintiff's gross business on the ground that this rate of increase affords no proper basis of measure for damages under the pleadings in this case.

(566) THE COURT: You are free to argue that. I do not think that is binding upon them.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and fifty-fifth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and

to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

MR. MONTAGUE: I respectfully except to so much of your Honor's charge as referred to a possible mode of computation of damages which you gave by an illustration of figures, on the ground that this was misleading and that in fact that in this case so contradictory is the evidence of the plaintiff and the evidence submitted in behalf of the plaintiff, that no proper basis of damages or measure of damages is in this case.

THE COURT: You can argue that also to the jury.

The exception by defendant to that part of the charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and fifty-sixth bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

MR. MONTAGUE: I also respectfully except to so much of your Honor's charge as relates to the damages on the ground that the measure that your Honor set forth is not properly set out in the charge.

THE COURT: There I call on you to tell me what would have been proper.

MR. MONTAGUE: I have already submitted a prayer in that respect—

THE COURT: But I ask you to tell me what would (567) have been proper.

MR. MONTAGUE: Just a moment, your Honor, I was about to add when you interrupted me that I had submitted a prayer in that respect. Answering your question directly I would state that the proper charge in that respect, in my opinion, is that under the proof in this case there is no proper damage.

THE COURT: And that I cannot agree with you in.

The exception by defendant to that part of the

charge aforesaid, having been allowed and noted, the defendant now prays the court to sign and seal this its one hundred and fifty-seventh bill of exceptions, which is accordingly done this 10 day of August, 1917, as fully and to all intents and purposes as if prepared and signed before the completion of the trial of this case.

JOHN C. ROSE, Judge. (Seal)

ASSIGNMENT OF ERRORS.

(568)

Filed August 20, 1917.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE
DISTRICT OF MARYLAND.

Frey & Son, Incorporated, a Corpora-
tion, Plaintiff,

against

The Cudahy Packing Company, a
Corporation, Defendant.

Assignment of
Errors.

The above-named defendant, The Cudahy Packing Company, by Gilbert H. Montague, its attorney, makes the following assignment of errors and shows that in the proceedings, record and judgment in the above-entitled case there was manifest error in the following respects:

1. The Court erred in overruling the objection of defendant, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: In regard to your own business, just tell generally the character of your business.

Answer: In 1914 we were doing the same as we are doing now, a city and out of town business. We sell goods entirely by catalogue through all the States along the Atlantic seaboard from Delaware down, including Delaware, Virginia, Maryland, West Virginia, the lower counties of Pennsylvania, North Carolina, South Carolina, Florida, and we have several customers in Ohio; we have several customers scattered out even at further points, in Georgia, but they are rare. In the city we do a strictly cash business, f. o. b. our warehouse, we

have no salesmen out. We have two men out on the street in the capacity of missionaries, men who follow up missionary orders and get new orders filled. People haul the goods from our place and pay cash for them.

(569) (Objected to; overruled; exception.)

The WITNESS: We send out catalogues to all the country trade. We have no salesmen at all in any way, shape or form, as publicity men or anything else in the country. We send a price card usually every week and a catalogue once a month. Recently we do not send them so frequently on account of the numerous changes in prices, but at that time we sent a price catalogue every month and a price card every week. Through the city we send out price cards at irregular intervals as the conditions of the business and the advantages that we have to offer in certain lines might necessitate our sending them.

2. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What is the volume of business that you do with States other than the State of Maryland?

Answer: I cannot answer that question because our sales in Maryland outside of the city of Baltimore are included in our out of town sales as a whole. I can give the total volume of our business and our city business as half of our business.

3. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: And the other half is in Maryland and the adjacent States? (Referring to plaintiff's business).

Answer: Yes.

4. The Court erred in overruling the objection of

defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

(570) Question by the COURT: Who came to see you with reference to the Cudahy Packing Company's business?

Answer: A number of representatives. Mr. Sonnehill, the Baltimore representative. During the whole period I can recall Mr. Sonnehill, Mr. Philp, Mr. Berry, Mr. Carson and Mr. Grace. They were all that were connected with the Old Dutch Cleanser Department, to the best of my recollection. We had representatives from the canned meat department, but I don't know their names.

5. The Court erred in overruling the objection of defendant, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by the COURT: Now, then, in 1914, did this question of the cutting of the prices arise between you and The Cudahy Packing Company, and if so, when?

The WITNESS: My first difficulty, according to the best of my recollection, was some time in the early part of 1913.

6. The Court erred in overruling the objection of objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Prior to February, 1914, tell us what, if anything, happened between you and the Cudahy Packing Company with regard to the cutting of prices.

Answer: I was called on in the spring of 1913 by a representative of the Cudahy Company. To the best of my recollection it was Mr. Berry. They came then so frequently that it is hard to keep track of them. He came to see me and stated that he knew I was selling goods to an out of town jobber at less than the list prices and told me that I knew that was wrong and demanded that I submit to his inspection the charges covering the shipment. It was either Mr. Berry or Mr. Philp, who demanded that I show him the charge.

7. The Court erred in overruling the objection of defendant to the following question, and in permitting (571) the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: I want to ask you whether or not the price of \$3.20 per case mentioned in that letter was the wholesale price of Old Dutch Cleanser at that time?

(Objected to; overruled, exception.)

Question: What was the wholesale price or price to the wholesaler at the time you received this letter of February 4, 1914, marked "Plaintiff's Exhibit No. 2"?

Answer: On that quantity it was \$2.95 a case.

8. The Court erred in overruling the objections of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What was the price of \$3.20?

Answer: That was the regular price to the retail trade in 25 box lots or upward.

9. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Do you know what that means?

Answer: Yes.

Question: Tell us.

(Objected to; overruled; exception.)

Answer: That meant to me that they would not sell me at the wholesalers' price, but would sell me at the retailers' price for the quantity I wanted.

(Motion to strike out; overruled; exception.)

10. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What did the \$3.20 (572) there represent at that time? (Referring to Plaintiff's Exhibit $\#10$, dated March 25, 1914.)

Answer: Their regular price to the retail trade.

11. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to answer the question and testify as follows:

Question by plaintiff's counsel: What was the price to the wholesaler at that time? (Referring to Plaintiff's Exhibit $\#10$, dated March 25, 1914.)

Answer: \$2.95 a case for 250 case quantities.

12. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What does the price represent there? (Referring to Plaintiff's Exhibit $\#19$, where \$3.00 per case is mentioned.)

Answer: The price to the wholesaler for that quantity.

13. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: The \$3.20 was what price? (Referring to Plaintiff's Exhibit $\#20$, where defendant wrote plaintiff that his order would be filled at \$3.20 per case.)

Answer: The regular price to the retail trade.

14. The Court erred in overruling the objection of defendant to the following question, and in permit-

ting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What effort, if any, did you make to get Old Dutch Cleanser from other wholesalers?

Answer: I wrote to the wholesale grocers in Norfolk.

15. The Court erred in overruling the objection of defendant to the following question, and in permitting (573) the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Did you send out a form letter?

Answer: Yes.

Question: To whom did you send it?

(Objected to; overruled; exception.)

Answer: The wholesale grocers in Richmond, Norfolk, Pittsburgh, and I wrote to New York, Philadelphia, Wilmington, I think it was Wilmington, and I have a list of everybody I sent it to attached to the form of the letter that went to every one of those people.

16. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: I show you a form letter dated February 6, 1914, and ask you whether or not you have a list attached showing to whom you sent it?

Answer: This is the form of the letter that was sent to each one of these people. This is the list I gave the stenographer and dictated the letter and this is the carbon copy of it.

17. The Court erred in overruling the objection of the defendant and in admitting in evidence, the carbon copy of the form letter marked Plaintiff's Exhibit #22, which is in substance as follows:

"February 6,—14.

"Messrs. W. & J. Parker,
"Portsmouth, Va.

"Dear Sirs:

"Can you supply me with some Old Dutch Cleanser?

"I will send you my personal check with order for same, made out in whatever way desired so that there need be no record of the transaction.

(574) "I will greatly appreciate any courtesy you can extend and will be pleased to reciprocate at any time.

"Kindly advise how many you can ship and at what price.

"Thanking you in advance, I am

"Very truly yours,

"FREY & SON, INC.,

".....

"President."

"WAF/MMM.

Attached to that letter is a list of names as follows:

A. B. Abbitt & Company, Newport News, Va.;
Bolling Grocery Company, Newport News, Va.;
S. W. Holt & Company, Newport News, Va.

Norfolk, Va.

G. & R. Barrett, Inc.;
A. Brinkley & Company, Inc.;
The Four Company;
Lewis Hubbard, Slack Company;
J. W. Pedlin & Company;
Shelsky, Hornthal Company;
The Southern Distributing Company;
Virginia Groc. Co.;
R. P. Voight Company;
E. L. Woodward Company.

Portsmouth, Va.

W. & J. Parker;
Jacobson Brothers;
T. L. Cleaton.

Richmond, Va.

C. W. Antrim & Sons;
Charles E. Brauer Company;
Christian Winifree Company;
Charles Davenport & Company;
Fleming & Christian Company;
(575) E. W. Gates & Sons Company;
W. H. Harris Grocery Company;
Harvey Blair & Company;
E. A. Saunders Sons Company;
Spence Nunnemaker Company;
Stokes-Grymes Groc. Co.

18. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: I will ask you whether or not you succeeded in purchasing any of the Old Dutch Cleanser from any of those people to whom you sent the letter? (Referring to Plaintiff's Exhibit #22.)

Answer: I succeeded in getting one lot of ten cases from S. W. Holt & Company, and could not get any more from anybody.

19. The Court erred in overruling the objection of the defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What did you pay for it? (Referring to lot ten cases from S. W. Holt & Company.)

Answer: I think I paid \$3.10 a case.

20. The Court erred in overruling the objection of

defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What was the wholesale price?

Answer: Three Dollars. I do not think there was a wholesale price on ten cases, however; I don't think I could buy less than twenty-five.

21. The Court erred in overruling the objection of defendant to the following question, and in permitting (576) the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's Counsel: Did you send out any other letters?

Answer: I wrote to Austin Nichols of New York.

22. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: I will ask you whether or not, on February 20th, you sent out any letter trying to get Old Dutch Cleanser?

Answer: Yes, I did.

23. The Court erred in overruling the objection of the defendant and in admitting in evidence the letter, marked Plaintiff's ± 23 , which is in substance as follows:

"February 20,—14.

"Messrs. Selman Bros.,

"New York, N. Y.

"Gentlemen:

"We are having a little disagreement with the Cudahy Packing Company, manufacturers of Old Dutch Cleanser.

"Can you supply us with any of these goods?

"If so please advise us what you can ship us and

what you will charge for it and I will send you a check to cover.

"Anything that you can do will be greatly appreciated and we will be pleased to reciprocate whenever possible.

"Very truly yours,

"FREY & SON, INC.,

".....
"President."

"WAF MMM.

24. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, (577) to testify as follows:

The WITNESS: The letter was sent to all the names on these two papers.

Question by plaintiff's counsel: Can you remember the names, of your own knowledge?

Answer: No, sir, that would be impossible.

Question: Read the names.

(Objected to; overruled; exception.)

Witness read names contained on list.

25. The Court erred in overruling the objection of defendant, to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: In answer to that letter to the persons to whom you have stated you sent it, did you or not succeed in purchasing any Old Dutch Cleanser?

Answer: I did not.

26. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Who are these peo-

ple that you sent this letter and the former letter of the 14th? (Referring to Plaintiff's Exhibit \approx 23.)

Answer: They are all wholesale grocers.

27. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What, if any, attempts did you make in the city of Baltimore to get Old Dutch Cleanser from the wholesale grocers?

Answer: I made no attempt here except one. I called one man up—

28. The Court erred in overruling the objection of defendant to the following question, and in permitting the (578) witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Whom did you attempt to get it from here? (Referring to Old Dutch Cleanser.)

Answer: A. Reiter & Company.

29. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Did you or not succeed in getting any from him? (Reiter & Company.)

(Objected to; overruled; exception.)

Answer: He quoted me the regular price to the retail trade for whatever quantity I would buy.

Question by the Court: I understood you did not get anything from A. Reiter.

The WITNESS: Not at that time.

30. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Have you at any time bought anything from A. Reiter?

Answer: In October, 1916.

31. The Court erred in overruling the motion of defendant to strike out, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Did any one at any time coming from the Cudahy Packing Company say anything to you as to what right, if any, a wholesale grocer had to sell to another wholesale grocer?

Answer: Yes.

Question: Who was it?

(579) Answer: Either Mr. Philp or Mr. Berry at the time he called on me in 1913.

Question: What did he say?

Answer: He told me I was selling out of town men at less than the list price and I knew I could not do that.

The COURT: What was it?

The WITNESS: Their representative came down and said he understood that I was selling to an out of town jobber at less than the list price and I knew I was not permitted to do that, and if there was any other than the retail price to be given to anybody, that the Cudahy Company was the only one to do that.

(Motion to strike out; overruled; exception.)

32. The Court erred in overruling the objection of defendant, to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What, if anything, had this conversation to do with your not applying to other wholesale grocers in the city of Baltimore for the Old Dutch Cleanser?

(Objected to; overruled; exception.)

Answer: It showed me that they were being very strict with the jobbers here.

(Motion to strike out granted.)

Question by plaintiff's counsel repeated.

Answer: My reply would be the same, it demonstrated to me that they were being very strict with the wholesale in Baltimore.

The COURT: Taking that into account, you did not think it worth while to do it, is that it?

The WITNESS: Yes, absolutely.

33. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, (Cen) to testify as follows:

Question by plaintiff's counsel: Do you know the volume of business that you did in Old Dutch Cleanser three years prior to February 4, 1914?

Answer: I prepared an actual list of our purchases right there on our desk from our purchase journal.

34. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to answer the question and testify as follows:

Question by plaintiff's counsel: Do you know the volume of your business for the three years back of February, 1914, and can you give it to us?

Answer: Back of 1911 our total volume was about \$1,300,000. In 1912 our volume was about \$1,400,000. In 1913 it was a little less than \$1,200,000. In 1914 it was nearly \$1,600,000.

35. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: And in 1915, what was it? (The volume of plaintiff's business.)

Answer: It was approximately \$1,700,000.

36. The Court erred in overruling the objection of defendant to the following question, and in permitting

the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Now I ask you about 1916. (The volume of plaintiff's business.)

Answer: It was over a million eight hundred thousand.

37. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, (581) to testify as follows:

Question by plaintiff's counsel: In regard to the cost of doing business, the ratio compared with the volume of business—

Answer: It varies very slightly in different years. Our average cost is about $6\frac{1}{2}$ per cent.

38. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Tell us the percentage cost of your carrying on your general business.

Answer: The cost of carrying on our business in 1912 was about $4\frac{1}{2}$ to 5 per cent. In 1913 the cost of carrying on the business was about a little over 5 per cent on the sales. In 1914 the cost of carrying on the business was a little under 5 per cent, likewise in 1915.

39. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by the Court: What were your gross profits then?

Answer: The gross profit was a little over six per cent on the entire sales. In 1914 they were over six per cent. In 1915 they were a little under nine per cent. In 1916 they were a little under nine per cent. In 1915 they were between eight and nine per cent. In 1915 they were between eight and nine per cent.

40. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by the COURT: You net profit ranged from something over one per cent to something under four per cent.

(582) Answer: A little over four per cent last year, or just about four per cent.

41. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by COURT: What per cent of the volume of your business for the year 1911 was Old Dutch Cleanser?

Answer: I will have to figure that out, your Honor, it was very, very small, compared with the total business.

42. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Now the next year and give the dates.

Answer: The cost of doing business was \$70,977.78 from the 4th of November, 1914, to the 4th of November, 1915.

43. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Now give us the next year.

Answer: The expense was \$74,646.02 from November 4th, 1915, to November 4th, 1916.

44. The Court erred in overruling the objection of

defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What about 1916 down to date? (Meaning the retail price of Old Dutch Cleanser.)

Answer: The same. (Meaning the same as in the preceding year \$3.40, \$3.30 and \$3.20 according to number of cases.)

45. The Court erred in overruling the objection of (583) defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: And in 1917, down to the date of the trial? (Meaning the retail price.)

Answer: The same. (Meaning \$3.40, \$3.30 and \$3.20 according to the number of cases.)

46. The Court erred in overruling the motion of defendant to strike out, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Just give us some idea about the demands you were having for it.

Answer: I could not give you an idea of the quantity; all the salesmen in the place were constantly after me to try to get it for them. We were losing trade and could not fill orders.

(Motion to strike out; overruling; exception.)

47. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: In your letter of February 5, 1914, you make the statement that "if you have any form of affidavit concerning the price maintenance feature of your selling contract, I will be pleased to sign the same." What did you mean by that?

Answer: I referred to the fact that if they wanted a contract that we would maintain the price of Old Dutch Cleanser I would give it to them.

48. The Court erred in overruling the motion of defendant to strike out, and in permitting the witness, Walter A. Frey, on cross examination to testify as follows:

Question by defendant's counsel: And every one else, whether he was a wholesaler or retailer, who was not on the list was, to your knowledge, quoted by Cudahy at the other price?

(584) Answer: I have no knowledge of that. A wholesale grocer I knew was buying —

(Objected to; overruled; exception.)

The WITNESS: Every wholesale grocer I knew was buying direct except myself, so I had no knowledge of any other prices quoted.

(Motion to strike out; overruled; exception.)

49. The Court erred in overruling the motion of defendant to strike out the latter part of the answer, and in permitting the witness, Walter A. Frey, on cross examination, to testify as follows:

Question by defendant's counsel: So when you stated that Mr. Carson said that he could not supply you with any goods, you want that qualified by the statement that he could supply you with goods only at this price of \$3.20 per case less 2 per cent for cash?

Answer: Yes. Of course I told him that that would not interest me, I could not afford to buy at that price.

(Motion to strike out latter part of answer; overruled; exception.)

50. The Court erred in sustaining the objection of the plaintiff and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, not to answer the following question on cross examination:

Question by defendant's counsel: Does this correct-

ly state your purpose at the time you brought this suit? "We feel, however, that nothing in the case so far has brought forth a final decision from the courts of law fully deciding the question of the manufacturers' and jobbers' rights in this matter, but we sincerely trust that the actions which we are now bringing will result in such final decisions." Was that your purpose in bringing this suit?

51. The Court erred in sustaining the objection of the plaintiff, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, not to answer the following question on cross examination:

Question by defendant's counsel: "It is our purpose, in case we lose in the lower courts, to carry these actions through to the higher court, and no doubt this will also be done by the other parties in the event of our winning in the lower courts." So far as that refers to you, does that state your purpose in the beginning of this suit?

52. The Court erred in making the following statement in the presence of the jury: (Referring to argument by defendant's counsel that it was material to show by his own statement that plaintiff derived the greatest benefit from the notoriety of the suit.)

The COURT: The last statement is, so far as anything that has been indicated by counsel is concerned, entirely unjustified and is highly improper.

53. The Court erred in sustaining the objection of the plaintiff, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, not to answer the following question on cross examination:

Question by defendant's counsel: Does this represent the attitude which you had when you began the suit? "We have no quarrel with manufacturers who attempt to fix the resale price on their products—"

54. The Court erred in making the following statement in the presence of the jury, and in overruling defendant's motion to withdraw a juror:

The COURT: I am not going to stop him from doing it. My judgment is that counsel seldom, with juries, advantage themselves by doing anything that is improper."

55. The Court erred in making the following statement in the presence of the jury; and in overruling defendant's motion to withdraw a juror.

The COURT: "I overrule your motion. I say that to persist in reading notations of that character, if it be done as counsel for plaintiff suggests, is an improper matter. I do not pass upon whether, in this instance, it (586) is proper or not. The jury sees it as well as I do, and it is the jury that usually visits the penalty."

56. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: I ask you if this is the correct copy of the article or statement which you gave to the *Journal of Commerce*?

57. The Court erred in refusing to receive in evidence the paper which the witness, Walter A. Frey, referred to as the statement which he had given to the *Journal of Commerce*, which paper was marked Defendant's Exhibit for Identification A, and is in substance as follows:

"The two suits which we are about to institute in the United States District Court will be against the Cudahy Packing Company and the Welch Grape Juice Company and the declarations are now being prepared by our attorneys, Messrs. D. W. Baker, of Washington, D. C., and Horace T. Smith, of this city.

"These suits are based on the fact that these concerns refuse to sell us their products, owing to the fact that they claim that we did not maintain the price which they fix as a selling price on their products. We have been deeply interested in the discussions in your columns concerning the 'price maintenance' matter and read with particular interest the article from the Macy Company, which we consider a very plain explanation of the reasons why it is necessary and desirable for large con-

cerns doing a cash business to sell their goods at a lower price than is being done by concerns doing business on a different basis.

“WANT A FINAL DECISION ON THE ISSUE.

“ ‘We feel, however, that nothing in the cases so far have brought forth a final decision from the courts of law fully deciding the question of the manufacturers’ and (587) ‘jobbers’ rights in this matter, but we sincerely trust that the actions which we are now bringing will result in such final decisions, as it is our purpose, in case we lose in the lower courts, to carry these actions through to the higher court, and no doubt this will also be done by the other parties in the event of our winning in the lower courts. We have no quarrel with manufacturers who attempt to fix the resale price on their products but, on the contrary, if the courts of law decide that they have the right to refuse to sell their products to the jobbers who refuses to follow their policy we will give them our cordial support and maintain their resale price. But we will then also insist that every jobber be compelled to live up to the agreements and will do all in our power to bring to the attention of the manufacturers these jobbers who secretly violate their agreements.

“ ‘We ourselves are thoroughly opposed to the policy of ‘price maintenance’; we do not think that there is anything right in it, and, if upheld, places a power in the hands of the manufacturer which he should not have. It gives him the power to restrict the territory in which the jobber can do business, and if generally followed by manufacturers would bring big jobbers out of business and make impossible the building up of large jobbing houses unless such houses would desire to become direct competitors of manufacturers by pushing other brands packed by themselves or for them. The basis of most of the manufacturers’ arguments are on the grounds that if the jobbers do not maintain the resale price the articles soon become unpopular with the retail trade and results in the loss of business for the manufacturers. We cannot feel that there is anything in this argument, for we have only to look around us and find article after article becoming more and more popular sellers every day and on which the manufacturers do not attempt to maintain the resale price. We refer

particularly to such articles as Quaker Oats, Gold Medal (588) and Pillsburg Flour, Magnolia Milk, Walter Baker's Cocoas and Chocolates, Pet Milk and numerous other items well known to the grocery trade.

“TO CLEAR UP MANUFACTURERS' RIGHTS.

“We believe the business atmosphere will be much clearer if the manufacturer asks us to; not because we have entered into any agreement to do so, nor through fear of the manufacturer should we sell them at another price, but simply because the price at which the manufacturer has asked us to sell, is about the price which we would sell these goods at, even though the manufacturer had not taken up the resale price with us at all, and because we do not find the competition causes us to sell at any lower price and the price shows us our proper margin of profit.

“We believe the business atmosphere will be much cleared by a final decision of the legal points on this subject. Some manufacturers attempt to enforce the ‘Price-maintenance’ features of their selling policy while others merely make a bluff at it and do nothing when an actual instance of their goods being sold at a lower price than named by them is brought to their attention. This is no doubt due to their uncertainty as to their real legal rights under the present laws. We ourselves feel that the jobber who can so systematize his business so as to conduct it on a lower percentage of cost than competitors, should have the right to offer his goods for sale at a correspondingly lower price to his trade, thus building up a larger business and putting the goods into the hands of the retailer and consumer at the lowest possible price.

“RETAILERS AND JOBBERS HAVE RIGHTS.

“‘Lots of things enter into the subject of ‘cost of doing business.’ Such things as ‘cash or credit business,’ doing business by ‘mail or through salesmen,’ elaborate system or the cutting out of red tape, ‘selling goods f. o. (589) b. warehouse or sidewalk delivery,’ all making a vast difference in cost, according as the jobber follows the one system or the other.

“Is it not reasonable to suppose that the retailer

buying for cash through the mail should expect to receive his goods at a lower price than the one who buys on long credit terms from the salesman? Likewise, should not the city retailer expect to receive an allowance if he buys his goods for cash and hauls them himself instead of buying them through a salesman on long credit terms and has them delivered by the jobbers' wagon?"

58. The Court erred in sustaining the objection of the plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: In Plaintiff's Exhibit No. 7, being your letter to Mr. Strauss of February 26, 1914, there is contained this statement: "We are today turning all the papers in this matter over to United States District Attorney to ascertain exactly what our rights in the premises are, also, of course, giving them your published jobbers prices and the correspondence we have had on the subject." Was that a true statement?

59. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: Did you, in fact, turn over the papers to the District Attorney as you have here stated?

60. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: Has the Department of Justice, so far as you know, prosecuted any indictment against the Cudahy Packing Company on account of your complaint.

61. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey,

not to answer the following question on cross examination:

Question by defendant's counsel: "The big fight will soon begin. Can the manufacturer dictate to the jobber the price at which he must sell his goods?" You recall that statement, don't you, Mr. Frey?

Answer: If it is in there, I do not recall it now, but if it is in there, I wrote it.

Question: Was that good publicity for your business?

62. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: Did it hurt your business to proclaim in your advertising that you had begun a suit, or were about to begin suit against the Cudahy Packing Company?

63. The Court erred in making the following statement in the presence of the jury:

The COURT: It goes not one whit into the question of damages, gentlemen. You cannot give Mr. Frey one single penny other than as compensation except in so far as there is a three time increase provided by law. You cannot give Mr. Frey one penny here for the sake of vindicating any cause whatever. You cannot give him one cent, except that which compensates him, and this automatic triple increase. You cannot give him one cent as smart money against these defendants. They cannot be made to pay a single cent of that kind, and you cannot properly give him one single penny less than you find he has suffered; and all questions of his motives as bearing on the question of damages are entirely beside the mark. The damages in this case are compensatory only. The jury are not entitled to give one cent more or one cent less than they find by the evidence is (591) the actual amount of damages suffered, and it makes no difference what the motives of this man in bringing this suit were, whether good or bad, they cannot be increased, no matter what they are, no matter how

good or how bad they are, and the damages cannot be diminished.

64. The Court erred in making the following statement in the presence of the jury: (Referring to statements showing plaintiff's motives in bringing the suit.)

The COURT: "Not to the amount of the damages. So far as they bear on his credibility as a witness they may be material. But the point you just suggested as on the questions of damages, they are absolutely and in all circumstances, must be immaterial, because the damages are compensatory only and do not depend on motives."

65. The Court erred in making the following statement in the presence of the jury:

The COURT: "Mr. Montague, my view is this, on that question, that if you do a thing which improperly in a specific way does a specific damage to a man, the fact that he is quick-witted enough and bright enough to get popular sympathy and help in the rest of his business because you have done him that wrongful thing does not affect the issue between you one bit, not the slightest."

66. The Court erred in refusing to receive in evidence the paper published by plaintiff marked Defendant's Exhibit E for identification, the substance of which is as follows:

"Who has always led the fight for Low Prices?

"Who among all the wholesalers, had the courage to go to Court to compel the Manufacturers to permit the Wholesaler to sell the retailer at low prices?

"Who pays all the expense of the fight?

"The Answer to all these questions is the same.

"FREY & SON, Inc."

67. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, (592) not to answer the following question on cross examination:

Question by defendant's counsel: Do those products include Lilac, Rose and Parrott Polish? Was Dutch Hand Soap one of those products too? (Referring to other products of the defendant in which defendant did missionary work.)

68. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: There are other cleansers that you could substitute in this market, are there not?

69. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: I hand you a can and ask you if this can contains a cleanser which is sold in Baltimore in competition with Old Dutch Cleanser?

(Can marked Defendant's Exhibit F, for identification.)

70. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: I now hand you another can which is described as Kirkman's Powder, a scouring powder, and ask you if this is a cleanser which is sold in Baltimore market in competition with Old Dutch Cleanser?

(Can marked Defendant's Exhibit G, for identification.)

71. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

can marked "Bon Ami Powder" and ask you if this is a cleanser which is sold in the Baltimore market in competition with Old Dutch Cleanser?

(Can marked Defendant's Exhibit II for identification.)

(593) 72. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: I hand you a can marked "Octagon Scouring Cleanser" and ask you if this cleanser is sold in the Baltimore market in competition with Old Dutch Cleanser?

(Can marked Defendant's Exhibit I for identification.)

73. The Court erred in sustaining the objection of the plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: I now offer in evidence the following cans and ask as to these cans, and as to the four cans previously offered for identification, whether from 1912 to the present time these were sold in competition in the Baltimore market with Old Dutch Cleanser?

(Cans marked for identification.)

74. The Court erred in sustaining the objection of plaintiff, and in permitting the witness, Walter A. Frey, not to answer the following question on cross examination:

Question by defendant's counsel: Have you any of the orders for these other cleansers which you sold, as stated in your letter to us of March 6, 1914, which I just read?

75. The Court erred in overruling the defendant's

objection, and in permitting the witness, Walter A. Frey, offered in chief by plaintiff, to testify as follows, on cross examination:

The COURT: Now, you can make any explanation you wish, if you want to.

The WITNESS: A gentleman employed, by the name of Walker who, was connected with the City Department, wanted to extend the cash method to the out-of-town trade. He got up that catalogue in an effort to see if he could develop the cash business through any out-of-(594) town people. He got up that catalogue and sent it out, three or four issues of which went out, I believe and the statements made in there are, I think, very correct, and borne out by the figures. Cash discount is never considered in our business as a part taken off the cost of goods. The cost price of goods is the market cost price, and on most things you cannot always figure on the price paid a manufacturer, because you pick them up at different points. There is no staple cost to them. Market cost plus the cost of doing business, and we have our one per cent and two per cent cash discount, and the one per cent we add on for profit makes two to three per cent, and the difference in the markets that we catch by speculative buying, and so forth, would easily make the profits, if that same basis was followed, on the entire business equal to the figures read out.

76. The Court erred in overruling defendant's objection and in admitting in evidence certain literature relating to Old Dutch Cleanser dated January 1, 1910, and October 1, 1912, marked Plaintiff's Exhibits 24, 25, 26 and 27, the substance of which is as follows:

PLAINTIFF'S EXHIBIT =24.

"O. D. C. No. 111.

SELLING PRICE TO RETAILERS

OLD DUTCH

CLEANSER.

SELLING PRICE TO RETAILERS.

"For all territory IN and EAST of the following states: North Dakota, South Dakota, Nebraska, Kansas, Oklahoma and Texas.

OLD DUTCH CLEANSER

48-10c. cans (sifting top) per case.

Less than 5 cases	\$3.40 per case (ex-Jobbers' stock)
5 cases and upwards	3.30 per case (
10 case lots and upwards	3.25 per (Freight will be
case	(prepaid
25 case lots and upwards	3.20 per (to all Railroad
case	(Stations

.....
 "OLD DUTCH CLEANSER and DUTCH HAND SOAP will be sold at Jobbers' prices to only such Jobbers as strictly observe the retail selling prices in this list on all of their resales, whether to their regular retail trade or to other jobbers and distributors.

"For retail prices in territory WEST of above see list No. 115, except for Colorado and Cheyenne, Wyo., see List No. 113. This list supersedes and cancels all previous lists.

THE CUDAHY PACKING CO.,
 O. D. C. Department,
 Chicago, U. S. A.

"NOTICE.

"OLD DUTCH CLEANSER and DUTCH HAND SOAP are products originated by us and protected by and sold under trade mark, which is our exclusive property.

"We support both jobber and retailer through the constant and prominent advertising of these products, which have attained an established and fixed position and value.

"It is our purpose to market the goods uniformly through exclusive jobbing distributive channels, and from there to the retail trade and thence again to the consumer.

"Our business and especially the extension of the

trade in these articles depends, mainly, upon their success in the market; and we, therefore, consider it essential to make every fair effort to assure to each merchant a steady and reasonable profit.

"Uniform and fair jobbing and retail prices and trading provisions accomplish this, and we further expect by such uniform sales promotion to gain a practical benefit in increased business to ourselves, to the jobber and to the retail merchant, and to merit their united appreciation, good will and support.

"IN RELATION TO WHOLESALERS SUPPLYING ONE ANOTHER.

IMPORTANT!

"It is the intent of our selling provisions governing distribution from jobbers' stock (or drop shipments from factory for account of jobbers) that the prices provided for different quantity lots, are to govern without exception.

"If wholesalers should sell other wholesalers or distributors at an intermediate price between jobbers' cost and the fixed retail price, special prices might thereby gradually be extended to semi-jobbers to the ultimate restriction of our business.

"Any sales by jobbers at special prices could have no other effect than to enable the purchaser, whether jobber, large retailer or otherwise, to demoralize prices and disturb the entire business in these products.

"To prevent this it is therefore essential that we be the only ones to decide who is to buy at wholesale prices, and it is for that reason that jobbers' sales to other jobbers and distributors should be strictly at our published retail list—or, in other words, at the same price at which the jobber would sell to any retailer.

"This is a matter of so much importance that we deem it essential to bring it prominently to your notice by this means.

Yours truly,

THE CUDAHY PACKING CO.,
O. D. C. Department.

PLAINTIFF'S EXHIBIT #25.

(597)

O. D. C. No. 80.

SELLING PRICE TO RETAILERS**OLD DUTCH****CLEANSER.****SELLING PRICE TO RETAILERS.**

**For all territory IN and EAST of the following states: North Dakota, South Dakota, Nebraska, Kansas, Oklahoma and Texas.

OLD DUTCH CLEANSER

48-10c. cans (sifting top) per case.

Less than 5 cases	\$3.40 per case (ex-Jobbers' stock)
5 cases and upwards	3.30 per case (
10 case lots and upwards	3.25 per (Freight will be
case	(prepaid
25 case lots and upwards	3.20 per (to all Railroad
case	(Stations

.....

 **OLD DUTCH CLEANSER and DUTCH HAND SOAP will be sold at Jobbers' prices to only such Jobbers as strictly observe the retail selling prices in this list on all of their resales, whether to their regular retail trade or to other jobbers and distributors.

**For retail prices in territory WEST of above see list No. 82.

**For Colorado and Cheyenne, Wyo., see Special List No. 90.

**This list supersedes and cancels all previous lists.

THE CUDAHY PACKING CO.,

O. D. C. Department,

January 1, 1910.

Chicago, U. S. A.

"NOTICE.

"OLD DUTCH CLEANSER and DUTCH HAND SOAP are products originated by us and protected by and sold under trade mark, which is our exclusive property.

"We support both jobber and retailer through the constant and prominent advertising of these products, which have attained an established and fixed position and value.

"It is our purpose to market the goods uniformly through exclusive jobbing distributive channels, and from there to the retail trade and thence again to the consumer.

"Our business and especially the extension of the trade in these articles depends, mainly, upon their success in the market; and we, therefore, consider it essential to make every fair effort to assure to each merchant a steady and reasonable profit.

"Uniform and fair jobbing and retail prices and trading provisions accomplish this, and we further expect by such uniform sales promotion to gain a practical benefit in increased business to ourselves, to the jobber and to the retail merchant, and to merit their united appreciation, good will and support.

**"IN RELATION TO WHOLESALERS SUPPLYING
ONE ANOTHER.**

IMPORTANT!

"It is the intent of our selling provisions governing distribution from jobbers' stock (or drop shipments from factory for account of jobbers) that the prices provided for different quantity lots, are to govern without exception.

"If wholesalers should sell other wholesalers or distributors at an intermediate price between jobbers' cost and the fixed retail price, special prices might thereby gradually be extended to semi-jobbers to the ultimate restriction of our business.

"Any sales by jobbers at special prices could have no other effect than to enable the purchaser, whether

jobber, large retailer or otherwise, to demoralize prices (599) and disturb the entire business in these products.

"To prevent this it is therefore essential that we be the only ones to decide who is to buy at wholesale prices, and it is for that reason that jobbers' sales to other jobbers and distributors should be strictly at our published retail list—or, in other words, at the same price at which the jobber would sell to any retailer.

"This is a matter of so much importance that we deem it essential to bring it prominently to your notice by this means.

Yours truly,

THE CUDAHY PACKING CO.,
O. D. C. Department.

Plaintiff's Exhibit Nos. 26 and 27 similar in substance to No. 24.

77. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Did or not Mr. Frey, at any time attempt to purchase Old Dutch Cleanser?

Answer: Yes.

78. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Did you sell it to him?

Answer: No, sir.

79. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Why not?

(600) Answer: I did not have it.

80. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Why didn't you have it?

Answer: I would not procure it from the manufacturers.

81. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: I will ask you whether or not you ever purchased Old Dutch Cleanser from the Cudahy Packing Company?

Answer: I did, yes.

82. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Covering what period of time?

Answer: I suppose I had Old Dutch Cleanser in my possession about six months—it was the latter part of 1911 when I started and in 1912 they refused to sell me.

83. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Will you state the circumstances under which they refused to sell you?

Answer: They claimed that I had made some bad sales.

84. The Court erred in overruling the objection of defendant to the following question, and in permitting (601) the witness, Chester R. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: I show you a letter of January 4, 1912, and ask you if you received that letter.

Answer: I did, sir.

85. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Did it come to you in the mail?

Answer: It came to me by mail, yes.

86. The Court erred in overruling the objection of the defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Was there any enclosure in that letter?

Answer: The enclosed form of application for jobbing terms, yes.

(Motion to strike out; overruled; exception.)

87. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: I will ask you whether or not there was in that letter any enclosure?

Answer: Yes, there was.

88. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Chester H. Thomas, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: Will you designate what they are?

(602) Answer: There were two applications asking me to sign, dated January 5, 1915.

89. The Court erred in overruling the objection of defendant, and in admitting in evidence the letter marked Plaintiff's Exhibit ± 30 , which is as follows:

January 9th, 1912.

"Messrs. Frey & Thomas,
 $\pm 226-230$ North George Street,
 York, Pa.

"Gentlemen:

"Have your favor of the 6th.

"We are very sorry at the position indicated in your letter.

"We enclose price list, and call your attention to the regulations which, according to your letter, you have not been observing.

"We make it a rule to retain on our preferred list of customers, to whom only we sell at jobbing prices, those who practically and fully co-operate in our marketing plan.

"We are sending copy of the correspondence to our Pittsburg Division Manager, Mr. A. F. Harbison.

"Regarding Harrisburg and your complaints about jobbers there, we can only say that your evidence is not conclusive, as retailer's statements are not always to be relied upon absolutely, and, in any event, we shall have to deal with the Harrisburg situation and the jobbers there on the merits of each case and we shall at once proceed to make a careful investigation.

"Yours very truly,

THE CUDAHY PACKING CO.,
 (Signed) E. A. S."

90. The Court erred in overruling the objection of (603) defendant, and in admitting in evidence the letter marked Plaintiff's Exhibit ± 31 , which is as follows:

"March 1st, 1912.

"Messrs. Frey & Thomas,
 York, Pa.

"Gentlemen:

"Beg to acknowledge receipt of your favor of the 28th.

"Please refer to your letter of January 6th and our reply thereto under date of January 9th and you will readily see that our position is not as unwarranted as you now seem to consider.

"In your letter of January 9th we fully explained our position.

"We are referring the entire file again to our Mr. A. F. Harbison, Division Manager at Pittsburg, who has charge of the territory in which you are located.

"Our interests are altogether to recognize every legitimate jobber who fairly cooperates with our marketing plan.

"As soon as we hear from Mr. Harbison, we will write you again.

"In the meantime, we remain

"Yours very truly,

THE CUDAHY PACKING CO.,
(Signed) E. A. S."

91. The Court erred in overruling the motion of the defendant, and in refusing to strike out the entire testimony in chief of the witness, Chester H. Thomas.

92. The Court erred in overruling the motion of the defendant for leave to withdraw a juror and for a declaration of a mistrial on the ground of surprise.

93. The Court erred in overruling the motion of the (604) defendant, and in refusing to strike out the entire testimony of the witness, Chester H. Thomas.

94. The Court erred in overruling the objection of the defendant, and in admitting in evidence the copy of a letter marked Plaintiff's Exhibit #36, which is as follows:

"New York, March 18, 1913.

"Mr. L. Sonnehill,

Dear Sir:

"Until further notice you will please not call on Messrs. Frey & Son, Baltimore, Maryland.

"Any orders that you may receive for their account or which may be tendered to you are to be referred to this office.

"Kindly return this letter with your acknowledgment.

"Yours very truly,

"THE C. P. CO.,

"T. J. GRACE,

"O. D. C. Dept."

95. The Court erred in overruling the objection of the defendant to the following question, and in permitting the witness, Lawrence Sonnehill, offered in chief by plaintiff, to testify as follows:

Question by plaintiff's counsel: What occurred between you and Mr. Philp?

Answer: We went down to see Mr. Walter Frey and I told him he would not have any trouble with Walter Frey, and Walter Frey would do anything within reason.

96. The Court erred in overruling the objection of defendant to the following question, and in permitting the witness, Lawrence Sonnehill, offered in chief by plaintiff, to testify as follows:

(605) Question by plaintiff's counsel: What do you mean by that, violating some agreement?

Answer: I mean, by violating agreement, if they were abiding by the instructions issued by the Cudahy Packing Company, and the instructions were that jobbers were to maintain the prices.

97. The Court erred in overruling the objection of defendant, and in admitting in evidence the book marked Plaintiff's Exhibit #37, the substance of which is as follows:

"MAINTENANCE OF PRICE SCHEDULE.

"It is our policy in marketing Old Dutch Cleanser and Dutch Hand Soap to wholesale grocers to maintain a uniform selling list (as published) to the trade. List

shall be observed absolutely by all of our connections and by jobbers and distributors handling our goods, without exception.

"All jobbers of our Old Dutch Cleanser and Dutch Hand Soap have been properly notified, form of which notice is shown on the other side of this sheet.

"It is needless for us to say that our sales connections must not cut price on these products, nor countenance price cutting on the part of jobbers or their salesmen, directly or indirectly, and any case of infringement of our limitations as to retail selling price should be promptly reported with all possible particulars as to date of order, date of shipment, name of merchant, location, number of boxes, &c.

"Our salesmen, so far as it comes within their province shall make it clear to jobbers and their salesmen that it is our purpose to carefully and effectively enforce our policy by all proper and legitimate means within our power."

On the back is the form of notice issued to jobbers of Old Dutch Cleansers. It reads as follows:

"The following is form of notice issued:

"To jobbers:

Old Dutch Cleanser and Dutch Hand Soap.

"We take this means of notifying you—as well as (and) other jobbers—that it is our purpose to maintain a uniform selling basis from all jobbers to the trade (both retail and jobbing) in accordance with our published price list on Old Dutch Cleanser and Dutch Hand Soap, as per copies herewith.

"These goods, which bear our exclusive trademark, are widely and prominently advertised and known, which has established for them a certain fixed position and value.

"It is our purpose to admit only those jobbers who fully maintain these prices to the privilege of direct buying from us at full jobbers' discounts, and to such jobbers only will we give the benefit of the assistance of our specialty selling force.

"Kindly arrange it so that your salesmen or employees will thoroughly understand these price limita-

tions, and that no business, directly or indirectly, will be done in violation thereof.

"We want to emphasize the fact that the interchange of stock, or the sale of Old Dutch Cleanser by one jobber to another, must be at full retail list only.

"We expect by the enforcement of the above conclusions to gain a practical benefit in increased business, both to you and ourselves on these products, and hope to merit the support and appreciation of your company and other jobbing trade.

"Yours very truly,

"THE CUDAHY PACKING COMPANY,
O. D. C. Department."

98. The Court erred in overruling the objection of the defendant, and in admitting in evidence the paper marked Plaintiff's Exhibit 238, which is as follows:

"THE CUDAHY PACKING CO.,
111 West Monroe St.,
Chicago.

(207) "Old Dutch Cleanser Department,
Cable Address, "CLYSOAP".

As to our
"CONFIDENTIAL INFORMATION
OLD DUTCH CLEANSER.

MARKETING PLAN AND PRICE PROVISIONS.

"To our General Representatives:

"O. D. C. PRICE LISTS contain full and exact particulars as to our price provisions, marketing plan and sales regulations.

"JOBBERs are those dealers whom we carry on our preferred list of customers, and it is only to such that we sell at prices and under the conditions shown in our special Jobbers' Price List. We recognize in this class only those wholesale distributors who have no retail affiliations.

"VIOLATIONS: Where a preferred or jobbing customer violates our marketing plan or price provisions, it is our policy to discontinue him from our list of preferred customers.

"We put on each Jobbers' invoice a stamp reading as follows: 'On all your resales of the Old Dutch Cleanser covered by this invoice, to either retailer or jobber, please observe our regular retailer's cost prices, in accordance with our published list.'"

"Our O. D. C. marketing plan, through jobbing mediums rests on mutual confidences, respect and co-operation and we look to the principals in control of each jobbing house for the carrying out of our policy within its ranks.

"Our general representatives are requested to make our policy clear to our customers at every available opportunity, to ask their support and gain their appreciation for the following important reasons:

"Old Dutch" is the original, the standard and the recognized seller in that line.

"It is continuously advertised on an important and National scale. It is marketed through exclusive jobbing channels. To maintain a uniform scale price is the only way to insure the jobber a fair and reasonable profit, and we will spend our time and money freely in support of this policy.

"We canvass the retail trade through a large and well organized force of specialty salesmen.

"We treat our customers with uniform consideration, courtesy and equality, making no exceptions and extending no special favors to any class of trade or to any special territory.

"We ask of our general representatives a careful consideration of the above facts, feeling sure that their proper understanding and steady promotion of same will secure for us the good will and appreciation of the wholesale trade and its support in the sale and further distribution of Old Dutch Cleanser.

Yours very truly,

THE CUDAHY PACKING CO."

29. The Court erred in sustaining the objection of (608) the plaintiff, and in permitting the witness, Law-

rence Sonnehill, not to answer the following question on cross examination:

Question by defendant's counsel: Was that \$3.40 profit which that jobber made, the jobber that Mr. Lorton was speaking of, excessive profit?

100. The Court erred in sustaining the objection of the plaintiff, and in permitting the witness, Lawrence Sonnehill, not to answer the following question on cross examination:

Question by defendant's counsel: Why did you want to help him? (Meaning Mr. Frey.)

101. The Court erred in sustaining the objection of the plaintiff, and in permitting the witness, Lawrence Sonnehill, not to answer the following question on cross examination:

Question by defendant's counsel: Do you agree with Mr. Frey's statement as it has now been repeated to you by the Judge, that 50 per cent of all the orders which you got from retailers and turned in to Mr. Frey were orders which the retailers refused to take?

102. The Court erred in sustaining the objection of the plaintiff, and in permitting the witness, Lawrence Sonnehill, not to answer the following question on cross examination:

Question by defendant's counsel: Rather an unfortunate impression is created both on the mind of the canvasser like yourself and on the mind of the jobber like Mr. Frey, where the order comes in and the retailers refuses to take the goods, isn't that so?

103. The Court erred in sustaining the objection of the plaintiff, and in permitting the witness, Lawrence (629) Sonnehill, not to answer the following question on cross examination:

Question by defendant's counsel: I will ask you to look through this bundle and see if you find any more five case orders.

104. The Court erred in making the following statement in the presence of the jury: (referring to paper not in evidence):

The COURT: That says if you do not succeed in switching, go without the order, and if you can switch, switch.

105. The Court erred in making the following statement in the presence of the jury: (referring to paper not in evidence):

The COURT: "If you are selling a retailer and he should ask you to book the order through a jobber who is not on your list, you will simply state, I am unable to accept the order for their account, please name another jobber." Now, I hold that to mean that the first suggestion would be that if we can not take an order through that man, give us another name. That certainly would not preclude the missionary from naming the jobbers, or some of the jobbers from whom he could get an order. If the retailer does not wish to name a jobber on our distributing agent's list"—and that means he must be told who is on the list—

106. The Court erred in making the following statement in the presence of the jury: (referring to paper not in evidence):

The COURT: Then I will withdraw my characterization of this, if it is desired, and will let the jury pass upon it—no, I will not do that, because I must construe the written document when it comes in, but I can only say that the jury may think, as I personally do think,—though my personal views are not controlling on the jury, that the jury will probably construe that document in the way I construe it.

107. The Court erred in overruling the objection of (610) the defendant to the following question, and in permitting the witness, Lawrence Somehill, to testify as follows on re-direct examination:

Question by plaintiff's counsel: I will ask you whether or not in any of the conversations you had with

any members of the Cudahy Packing Company, any objection was made to Frey & Son's credit?

Answer: None whatsoever.

108. The Court erred in overruling the objection of the defendant to the following question, and in permitting the witness, Lawrence Sonnehill, to testify as follows on re-direct examination:

Question by plaintiff's counsel: Was there, during the time that you represented the Cudahy Packing Company, any change in the plan of selling, as far as you know?

Answer: Except we afterwards called the jobbers distributors.

109. The Court erred in overruling the objection of the defendant to the following question, and in permitting the witness, Louis W. Hammen, to testify as follows:

Question by plaintiff's counsel: During your connection with Frey & Son and with reference to the time after January, 1914, tell us what demands, if any, you had for Old Dutch Cleanser from the retail trade.

Answer: We have had quite a large demand for Old Dutch Cleanser. It was one of the most popular sellers we had. There was no reason why we would not have a large demand for it. I do not know just what the size of the demands were; I don't remember that any more, but we still have demands up to the present date for it.

110. The Court erred in overruling the objection of the defendant to the following question, and in permitting the witness, Louis W. Hammond, to testify as follows:

(611) Question by plaintiff's counsel: Could you say as to whether they are considerable or not, beginning January 1st, 1914, and ending in May, 1915, just after you were cut off.

111. The Court erred in overruling the motion of

the defendant to strike out the entire testimony of the witness, Louis W. Hammen, offered in chief by plaintiff.

112. The Court erred in sustaining the objection of the plaintiff, and in permitting the witness, Frank T. Reiter, not to answer the following question on cross examination:

Question by defendant's counsel: Do you regard the difference between the price at which you buy, as you have testified, and the price at which you sell, as a suitable profit?

113. The Court erred in sustaining the objection of the plaintiff, and in permitting the witness, Frank T. Reiter, not to answer the following question on cross examination:

Question by defendant's counsel: Were there any other cleansers on the market during the period from say 1912 up to the present time?

114. The Court erred in sustaining the objection of the plaintiff, and in not permitting the witness, Stuart Edgerton, to answer the following question on direct examination:

Question by defendant's counsel: During these years did the Cudahy man who was selling Old Dutch Cleanser in this neighborhood ever bring in to you any orders from anybody else for Old Dutch Cleanser?

115. The Court erred in sustaining the objection of the plaintiff, and in not permitting the witness, Stuart Edgerton, to answer the following question on direct examination:

Question by defendant's counsel: Did you ever fill any orders for Old Dutch Cleanser during this period except those which were solicited by your own sales force?

(612) 116. The Court erred in sustaining the objection of the plaintiff, and in excluding from evidence Defendant's Exhibit W being the portion of the deposition on

direct examination of Emil A. Strauss of Chicago, Illinois, from page nine on, taken before F. S. Dickinson, a notary public, and offered by the defendant, the substance of which is as follows, the part in parenthesis having been admitted and read to the jury:

Emil S. Strauss testified:

That he was department manager of the defendant's Soap Department and Old Dutch Cleanser Department; and had been so employed about 18 or 20 years; that he had been engaged in marketing Old Dutch Cleanser for the defendant since 1905; that the picture of the Old Dutch woman with the stick—and the name—were adopted as a trade mark in 1905.

That he made a study for a number of years of the conditions surrounding the marketing of so-called "specialties" and previously had had experience in marketing a light floating soap; that this study led him to adopt a plan for marketing Old Dutch Cleanser the essential features of which were the following a uniform plan of promotion involving the education as to the merits of the goods, of the general public and finding the proper medium of distribution to the public through the so-called trade channels, wholesale and retail; that the defendant undertook the promotion of Old Dutch Cleanser through all channels of trade down to the ultimate consumer; that defendant knew that in order to get a general and generous distribution, it had to have the consumers' approval through educational methods and a distribution through the wholesale and retail grocers or other merchants. That as a matter of economy he did not utilize direct selling to the retail trade; that the number of retail merchants at that time was about 400,000 and of wholesalers approximately 4,000, that the wholesalers have their own salesmen and solicit all of their trade steadily and as a consequence do it at a minimum of expenses, whereas if defendant sold to 400,000 retailers direct it would take a force of salesmen (613) which would involve an expense to such an extent as to make the price impossible to the consumer, or so much higher that it could not have been a practicable merchandising proposition. That at a conference of defendant's officers, defendant adopted a policy of making an investigation or an experiment in New York City,

Greater New York; that he went to New York in the early fall of 1905 with an appropriation and tried the market from various standpoints of promotion and merchandising; that the jobbing trade and the retail trade were absolutely impossible of being reached; that they stated that they had so much of that sort of thing presented to them daily that they could not undertake to give it any consideration or even help. So that it was up to him to interest the merchandise trade, both jobbing and retail, by reaching the highest percentage of the public and the consumer. That defendant spent a great deal of money in advertising of every imaginable kind including bill posting; street car advertising; painted signs; electric signs; store work, meaning advertising placed in stores, all of which defendant found of very negligible effectiveness, and after two or three months defendant adopted a policy of house to house canvassing and the policy of a fair sized sample in every home by its own directly paid solicitors; that this work was carried along for some six or eight months; that he stayed in New York practically all of that time with the one object and defendant gradually found a little response which was encouraging and there was a continuance of the advertising which kept going on and the salesmen, in working the retail trade on behalf of the jobber, were gradually able to pick up an increased volume of business; that of course it really cost the defendant more than the value of the goods for that particular development and the investment was very large; that following the little demand that was gradually built (614) up amongst the retail merchants having its inception in the demand coming in from the consumer, defendant was able to go to the jobber, but almost uniformly the jobber would not handle the goods even then. That in order to get a start with the wholesale trade, defendant had to guarantee the sale of the goods and promise to take them back in case they did not sell; that defendant never had to take any of the goods back exactly, but it had a very hard row to hoe in eventually getting the jobber to understand that it was doing the thing in a practicable way and that it was not alone making a "spurt" as a lot of specialty houses did on their goods and then quit them and leave the jobber with a lot of the product, but that on the contrary it followed up and wished to create a business on a product that had merit,

especially so when backed up by the Company that they had all done business with in other directions or in the same line; that gradually defendant got a little business that way, and got it built up and developed, and it had grown without exception ever since.

That in addition to putting samples in the houses defendant did demonstrating and demonstrating means employing girls, all experts or girls who had been taught to go into a home and show the housekeeper the advantage of using Old Dutch Cleanser as against some of the other products that they were using, in other words, promoting the consumption of our goods through a practicable demonstration of them. That the advertising which was done was aimed altogether at the public; that defendant never sold goods excepting to the wholesalers directly and never to the retailers; that defendant cultivated or solicited the trade of the retail dealer only in so far as it was trying to merit and uphold their good will; that defendant followed this plan of soliciting the retail trade; that it went to the retail dealer and showed him what it was doing to interest the public, to interest the consumer. It called his attention to the merit of the goods; it undertook to interest him in the goods by (615) showing him fair and proper treatment and by telling him that it would be its aim to try to uphold him in a fair and proper way and that so far as it reasonably could it would do so. That defendant gave the retailer pieces of advertising matter to assist in the sale of the goods and followed with a very large line of so-called "store advertising methods," individual pictures, booklets giving a history of the proposition and the merits of the goods and the modes of use, with painted signs in his windows, and defendant made displays in the windows and put in people to demonstrate the goods in the store. That the people who went around with this advertising material were employees of the defendant and were paid entirely by it and their work was entirely for the purpose of going around to the retail trade in the fashion described; that these men were instructed to accept orders only for account of the distributing agent—the jobber; that in order to unify its methods, it instructed the solicitors for about as many as one hundred men exactly how to word their inquiries. They were to say to the retailer, after they had agreed upon an order, "Through what wholesaler will you have these goods

delivered and shipped or billed?" That defendant never tried to influence the retailers as to what course they might follow in that respect; that as between two wholesalers, both handling Old Dutch Cleanser, defendant's solicitors never tried to prefer one wholesaler as against another, and it would have been directly contrary to instructions if they had, and defendant would not have allowed it if it had known it; that defendant regarded this impartiality of its solicitors, as regards wholesalers, as an essential feature of its plan of marketing Old Dutch Cleanser; that this was essential as a matter of equality and fairness, and if it were otherwise, would naturally effect the sales and distribution of Old Dutch Cleanser because if one jobber found that defendant was (616) favoring another jobber he would naturally favor somebody else as against defendant; whereas if defendant distributed the work of its solicitors according to the wishes of the retailer defendant was not involved at any time; that in the extension of the promotion of the sale of Old Dutch Cleanser from New York to the rest of the country, he found the same conditions such as he has described as characteristic in New York; that in the beginning of the experimental work at New York, defendant had absolutely no help from the jobbers and jobbers' salesmen in the promotion of Old Dutch Cleanser. As the goods gradually became known and the demand was created in the trade, the jobbers took such a nominal interest as the general business warranted but directly and specifically defendant had no support or help from them. Naturally the jobber did not know anything about what defendant would eventually do with Old Dutch Cleanser as to introducing it and following it up and developing an interest in the trade in it; it was the policy of the jobber to avoid taking up new things of that kind, especially so-called "specialties," articles of that kind because they had been burnt so often; but this difficulty was very gradually overcome and only as the demand and the growth of the trade on the product warranted it; that in working out its plan for the distribution of Old Dutch Cleanser, he considered the question of prices, and quantity lots and cash discounts, and credit terms, freight allowances, etc.; that he took into account in respect of these various payments the ultimate object of getting the largest possible business on the product and of securing the good will and fair con-

sideration of the trade; that he decided upon a schedule of prices, a price for quantity lots, ranging from single boxes upward, to the general trade, with a compensation or allowance to defendant's distributing agents who were regularly classed as such; that he allowed a different (617) price for quantity lots than what he did for single boxes; that prices to the general trade were based on single boxes, five box lots and five up to ten, ten to twenty-five and upward; that by general trade he was referring to the general retail trade, to the general trade that defendant solicits for account of the distributing agents, that is, the trade outside of the distributing trade. This includes all trade of whatever kind except defendant's regularly appointed distributing agents. That defendant has always and uniformly and fixedly advertised Old Dutch Cleanser to the ultimate consumer at ten cents a can; that this has been done in the form of a specific statement to that end contained in the advertisements; that the basis of prices being ten cents, defendant figured from that basis in arriving at the price that it considered practical and fair to the retail trade, and that price to the retail trade involves substantially an average profit of 50 per cent on the retailer's cost. The retailer's cost is based on single box lots at \$3.40; 5-box lots at \$3.20; 10-box lots and upwards in each case, \$3.25; 25-box lots and upwards, \$3.20; cash discount of two per cent if paid within cash discount period of ten days after date of invoice. In turn compensation to the distributing agents, is calculated by defendant on a fair allowance as deponent knew it to be governed in the trade on that class of goods, soap, soap powders, scouring soaps and the like. So that the distributing agents' profits average approximately 13 to 13½ per cent, being based on the allowance of 40 cents a box on the single box price, on \$3.40 to the retailer with an additional allowance of two and a half cents a box in minimum 100 case lots and upwards, five cents a box on minimum 250 case lots and upwards, seven and a half cents a box on minimum car-load lots and the same discount for prepayment, that is, two per cent; that this schedule of prices permits the retailer to sell cans of Old Dutch Cleanser to the consumer at a price below ten cents per can and the retailers have generally cut the price par- (618) ticularly with larger sales. One of the popular prices is "Three for a quarter," three cans for twenty-

five cents; that the defendant has not in any way either by suggestion or otherwise indicated any disapproval of this practice; it has been its aim to let the trade know that ten cents was the consumer's price, and it has not felt at liberty to go beyond that. That the experimental work in New York lasted approximately six months as an intensified proposition, and has been continuously followed up right along since then. That from that time, defendant took larger markets here and there, in various parts of the country to test out the sectional differences, if any; that it went to Baltimore, Detroit, San Francisco, Denver and New Orleans, and gradually filled in the outlying districts, or in the other markets as it was able to get to them. That defendant did not follow in all cases exactly the same method described as having been used in New York, although in principle it was the same. In Detroit, for instance, it followed a campaign of circularizing through defendant's agents, Ben. B. Hampton & Company, of New York. It got up a lot of attractive circulars, cards and letters. It used the newspapers extensively in Detroit. It put on wagons, loaded the goods up which had been purchased from the retailer and put them right into the house and sold them for cash and turned the cash over to the retailer. That in other parts of the country defendant's main object in all cases was the ultimate consumer to start with, and only that, the first effect of which was on the retailer and, in turn, on the jobber in time. That this was true of the promotion work in all parts of the United States, and this general introductory campaign covering the United States lasted about eight or nine years. That at the present time defendant's distribution of its Old Dutch Cleanser throughout the United States is thorough. That in defendant's plan of distribution (619) throughout the United States, the function of the distributing agent is to take care of the requirements of the retailer in his district supplying him from his stock and making quick deliveries; that as a part of this plan the distributing agent also supplies the retailer and gives him credit and calls on him through his salesman and follows the regular distributing and jobbing method as applied to the goods that he is interested in and carries. That it is the province of defendant's canvassers to educate the retail trade as to the advantages of Old Dutch Cleanser to the public and to the retailer; to advertise his

goods in the store of the retailer and to explain to him the advantages of selling Old Dutch Cleanser against the other competitors' products and generally to promote and build up the business of Old Dutch Cleanser in the interest of a given retailer in this way; that defendant doesn't know what prices the distributing agents salesmen quote when they call on the retail trade but defendant's own salesmen invariably follow the list prices which are \$3.40 in singles and up; 5-box lots, \$3.20 and 10-box lots, \$3.25; 25-box lots \$3.20, cost to the retailer, the terms being usually 60 days net, or two per cent off for cash, if paid within 10 days. That defendant's plan would fail naturally if there was not a uniform and equitable list to everybody. That if any of its own men, canvassers or solicitors had quoted at one price and other people who handled the goods had another price, defendant's canvassers could not maintain their position at all. If they quoted a higher price it would be useless to defendant and the retailer would not have any confidence in them if they could not sell as reasonably as anybody else could. That defendant's main purpose and the only purpose in having prices is to have distribution uniform. That defendant really has only one price, and that is the price to the general trade, to the retailer, and that price defendant aims to maintain. That is the only price defendant considers. It has not any other (620) price in its business at all. That defendant selects distributing agents for Old Dutch Cleanser generally and practically exclusively from what is known as the wholesale trade, which comprises mainly wholesale grocers, wholesale druggists and also wholesale people in the notion line or any other line of business that supplies goods to the retail stores of that handles products of grocers in any form; general stores in the country for instance. That the main distribution is through wholesale grocers and defendant selects those wholesale grocers by taking those whom it knows do a legitimate wholesale grocery business, that is, those who have no retail affiliations, who wholesale only and do not sell to the consumers directly as interfering with the established retail trade as such, and who have the facilities for such wholesale distribution, at least to a reasonable extent. That the compensation allowed to the distributing agents is substantially on the same general basis as the soap trade generally allows the wholesaler

or assumes to allow the wholesaler. In other words, it ranges in the soap trade generally, from about 10 to 15 per cent. That the wholesaler, the distributing agent, has, comparatively speaking, only fair remuneration. In deponent's experience he has generally not been satisfied with it, but he has accepted it because it averages with the others and furthermore for the reason that he has not really got to sell the goods. It is not a forced trade proposition with him. He claims that his cost ranges from 10 per cent nowadays, so that his margin of profit is in any event very small. But he is well satisfied to sell at defendant's general sales list and to take the profit that it allows him as a minimum. He really wants more and would like to get more. That he is willing to sell at that general list price mainly because that is the list that defendant sells at through its own men and that defendant asks them to sell at and defend- (621) ant suggests it as a fair distributing price from his own stock and in his own business. That it is profitable for the distributing agent to sell on that basis of compensation because Old Dutch Cleanser is almost essentially based on the consumers demand so far as the jobber and the retailer are concerned and they only handle it practically as an incident of their business, at least that is true of the retailer in responding to the demand from the public, so that the jobber in his turn has only to fill a demand and has not got the actual force selling to do, so that his relative expense is perhaps a little less than it is on the aggregate of his general business and consequently the margin of profit appeals to him from that standpoint. Furthermore, it is a high-grade product, it stands well with him owing to the position that it holds with his customers and in turn with the consumer. That if defendant did not have the plan described, in deponents opinion, it would not have much business after a little time. It might be a year, it might be three or four or five years, but it is from the fact that whereas the distributing agent now feels satisfied to handle Old Dutch Cleanser and makes a living out of it, if defendant had no plan and did not try to protect the distributing agent, if his labors would sell it without defendant doing anything at all, at any old price, may be cost or less, he would naturally say, "Those goods cause me to lose money and I have my expense for nothing and I won't handle them; I will buy something else;

I will put my own brand out and get a profit out of it," as they do with a lot of specialties. Defendant could not possible expect co-operation with the general run of distributing agents unless it could reasonably say to them, "We will do all that we possibly and reasonably can to protect you against any unreasonable and unfair competition," and while defendant cannot say to such competitors that it will bring them before the law, and (622) while it cannot punish them, at the same time it can say to them, "We would like to have your co-operation because everybody else buys at the same price and everything will be equitable and fair and just," and defendant feels that whereas there may be some irregularities in its distribution here and there, that in the aggregate they will find it to their own best interests to sell at defendant's given price and in that way defendant co-operates in getting to a fair degree at least, the relatively small margin of profit that it provides for them in its plan of distribution. That from the experimental period in New York, as described, continuously down to the present time, it has been the purpose and aim of the defendant to use the methods which have been described in the promotion and distribution and sale of Old Dutch Cleanser.

(End of direct examination.)

After answering various questions upon cross examination, the witness refused to answer the following questions by plaintiff's counsel, and thereupon plaintiff's counsel gave notice that he would object to the use of any of the deposition on the part of the defendant:

Q. How much per can does the advertising enter into the cost of Old Dutch Cleanser?

Q. How much money does the Cudahy Packing Company spend per year in advertising Old Dutch Cleanser?

Q. How much money a year during the year 1913 did the Cudahy Packing Company spend in advertising Old Dutch Cleanser?

Q. And the same question with respect to the year 1914.

Q. And the same with respect to the year 1915?

Q. How many cans of Old Dutch Cleanser were

marketed by the Cudahy Packing Company during the year 1913?

The WITNESS: Would it be proper to state in this case in answer to the question that we have always considered that as confidential in our business. That we have never given it out and have no desire to give it out. I was asking in order to see how far I was authorized to (623) go in answer to your question and I would like to say that such is the fact in other words that information as to our business and its expenditures have always been considered by us as strictly confidential and is not given out even among our own organization, for business reasons and as being best from every standpoint.

Q. Now, I ask you the same question with reference to the year 1914?

Q. And now the same question repeated with respect to the year 1915?

Q. Now please state the amount of Old Dutch Cleanser sold by the Cudahy Packing Company in dollars and cents during the year 1913.

Q. If I asked you with respect to the years 1914 and 1915, you would also refuse to answer? A. Yes, sir.

Thereafter the plaintiff's counsel continued the cross examination of the witness and the witness refused to answer the following questions:

Q. Tell me whether the Cudahy Packing Company makes a profit on Old Dutch Cleanser? A. We have made a profit on it.

Q. Did you make a profit on it in 1912. A. Yes.

Q. How much?

The WITNESS: That is inside information, that is our own business and that we never give out or permit to be publicly developed.

Q. I ask you the same question repeated the profits of your company on Old Dutch Cleanser during the year 1913?

Q. The same question with respect to the year, 1914?

Q. The same question with respect to the year, 1915?

Q. And the same with respect to the year, 1916?

Q. The same question with respect to the year (624) or so much of it as has gone by of 1917.

Thereafter plaintiff's counsel continued the cross

examination and the witness was examined on re-direct examination. On re-cross examination, the witness refused to answer the following question by plaintiff's counsel:

Q. I want to know what a can of Old Dutch Cleanser filled and labeled costs the Cudahy Packing Company?

(625) 117. The Court erred in overruling the objection of the defendant, and in admitting in evidence the testimony as to the volume of business done by the plaintiff from February 1st, 1914, to May 12, 1915, to-wit, \$1,005,104.95.

118. The Court erred in overruling the objection of the defendant, and in admitting in evidence the testimony as to the volume of business done by the plaintiff from October 15th, 1914, to May 12th, 1915, to-wit, \$895,249.21.

119. The Court erred in overruling the objection of the defendant, and in admitting in evidence the testimony as to the volume of business done by the plaintiff from February 1st, 1914, to October 15th, 1914, to-wit, \$1,009,855.74.

120. The Court erred in refusing to grant the following prayers and each of them, offered by the defendant:

DEFENDANT'S PRAYER NO. 1.

The defendant prays the court to instruct the jury that under the pleadings and evidence in this case, there is no legally sufficient evidence to entitle the plaintiff to recover and their verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 2.

The defendant prays the court to instruct the jury that there is no evidence in this case legally sufficient to entitle the plaintiff to recover under the first count in the declaration, and in determining their verdict the said count cannot be taken into consideration.

DEFENDANT'S PRAYER NO. 3.

The defendant prays the court to instruct the jury that there is no evidence in this case legally sufficient to entitle the plaintiff to recover under the second count in the declaration, and in determining their verdict the said count cannot be taken into consideration.
(626) 121. The Court erred in refusing to grant the following prayers and each of them, offered by the defendant:

DEFENDANT'S PRAYER NO. 6.

The defendant prays the court to instruct the jury that if you find that the only purchases and sales of Old Dutch Cleanser which the plaintiff made, or was actually prevented from making, were transactions wholly within the State of Maryland, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 7.

The defendant prays the court to instruct the jury that unless you find some contract, combination, conspiracy, discrimination or arrangement directly restraining commerce between one state or territory or the District of Columbia and another state or territory or the District of Columbia, to which the defendant was a party and which injured the plaintiff, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 8.

The defendant prays the Court to instruct the jury that if Old Dutch Cleanser distributing agents refused to sell the plaintiff Old Dutch Cleanser at less than the prices listed by the defendant or at any price solely because the defendant had suggested that they so refuse, but wholly without any obligation or compulsion upon them so to do, you must treat such refusal as lawful.

DEFENDANT'S PRAYER NO. 9.

The defendant prays the court to instruct the jury

that if Old Dutch Cleanser distributing agents refused to sell the plaintiff Old Dutch Cleanser at less than the prices listed by the defendant or at any price primarily because they did not wish to strengthen their own competitor or because they did not wish to give up any of the profit which the list prices afforded them, and only secondarily because the defendant had suggested that they so refuse, you must treat such refusal as lawful.

DEFENDANT'S PRAYER NO. 10.

(627) The defendant prays the court to instruct the jury that if Old Dutch Cleanser Distributing agents refused to sell the plaintiff Old Dutch Cleanser at less than the prices listed by the defendant or at any price because they did not wish to strengthen their own competitor, or because they did not wish to give up any of the profit which the list prices afforded them, you must treat such refusal as lawful.

DEFENDANT'S PRAYER NO. 11.

The defendant prays the court to instruct the jury that a mere difference in the price or prices quoted to different customers is not a discrimination within the meaning of the Anti-Trust Laws; in order to constitute a discrimination, the difference must be so great as to be unreasonable or unjust.

DEFENDANT'S PRAYER NO. 12.

The defendant prays the court to instruct the jury that even though you should find that the defendant did quote a higher price to the plaintiff than to other jobbers in Baltimore, the defendant does not for that reason become liable in damages unless you also find from the evidence that the effect might be to substantially lessen competition or tend to create a monopoly.

DEFENDANT'S PRAYER NO. 13.

The defendant prays the court to instruct the jury that it is no unlawful discrimination for a manufacturer or other vendor to select his own *bona fide* customers, provided the effect of such selection is not to substan-

tially and unreasonably restrain trade. It does not substantially and unreasonably restrain trade to quote a higher price to a man who is using his dealing to injure the vendor, when said vendor makes and sells a highly advertised article such as Old Dutch Cleanser.

DEFENDANT'S PRAYER NO. 14.

The defendant prays the court to instruct the jury that the defendant in this case has the unquestioned right (628) to stop dealing with a jobber for reasons sufficient to itself.

DEFENDANT'S PRAYER NO. 15.

The defendant prays the court to instruct the jury that any manufacturer has the unquestioned right to deal with, or to stop dealing with, any jobber of his product, and that the reason is of no consequence.

DEFENDANT'S PRAYER NO. 16.

The defendant prays the court to instruct the jury that where the manufacturer distributes his product through jobbers upon whose methods of business he is largely dependant for the distribution of his manufactured product, he has the right to choose the jobbers through whom he will sell and distribute his product, and that the motives influencing his choice are the concern of no one but himself.

DEFENDANT'S PRAYER NO. 17.

The defendant prays the court to instruct the jury that the defendant, Cudahy Packing Company, had an unquestioned right to cease dealing with, or to quote a higher price to the plaintiff, Frey & Son, Incorporated, than it did to its regular distributing agents, and to cease using said plaintiff as one of its distributing agents and that it is immaterial whether the defendant, Cudahy Packing Company, refused to sell, or quoted a higher price to the plaintiff, Frey and Son, Incorporated, or refused to use the said plaintiff as a distributing agent, because it was cutting the price of Old Dutch Cleanser, or whether it was for any other reason.

DEFENDANT'S PRAYER NO. 18.

The defendant prays the court to instruct the jury that a manufacturer who has created and continues to create and promote by its merit, by the use of canvassers, and by the use of an extensive campaign or system of advertising, and who markets his product under a trade name or brand which he has made known and valuable by (629) the foregoing methods, has in such manufacturing business connected with such trade name or brand and its reputation, created a valuable property in the maintaining of which he has an interest, and that he has an unquestioned right to protect such property by any reasonable method including both the right to refuse to sell and the right to make reasonable differences in the price basis quoted.

DEFENDANT'S PRAYER NO. 19.

The defendant prays the court to instruct the jury that it being open to anyone else to make and sell a competing scouring powder or scouring soap or cleaning preparation under any other name which does not infringe upon the trade name "Old Dutch Cleanser", a refusal by the defendant, Cudahy Packing Company, as a manufacturer of Old Dutch Cleanser having an exclusive right only in the trade name, to allow the distributing agents compensation or discount to a dealer who resells at less than the list price, is not a restraint of trade, and is not unlawful under the antitrust laws.

DEFENDANT'S PRAYER NO. 20.

The Defendant prays the court to instruct the jury that everyone is at liberty to make and sell scouring powder or scouring soap or cleaning preparations in his own name just as the defendant, Cudahy Packing Company, can under its trade name Old Dutch Cleanser. There is no evidence in the case that the defendant, Cudahy Packing Company, has attempted, in violation of the anti-trust laws, to monopolize the sale of scouring powder or scouring soap, or cleaning preparations, and it is not liable under the anti-trust laws to the plaintiff merely by reason of its exclusive right to make and vend a clean-

ing preparation under the name of Old Dutch Cleanser.

DEFENDANT'S PRAYER NO. 21.

The defendant prays the court to instruct the jury that there is no evidence that the defendant, Cudahy Packing Company, has attempted by contract, combination or conspiracy with any person or persons to unduly restrain interstate commerce in scouring powder, or (G30) scouring soap, or cleaning preparations generally, and you are to determine from the evidence whether, under all the circumstances of the case, there was any contract, combination, or conspiracy between the defendant and any person or persons regarding the interstate trade or commerce in Old Dutch Cleanser which materially and unduly restrained interstate trade and commerce in scouring powder, or scouring soap, or cleaning preparations.

DEFENDANT'S PRAYER NO. 22.

The defendant prays the court to instruct the jury that one who desires to become a distributing agent of Old Dutch Cleanser has no right to complain because the defendant, Cudahy Packing Company, chooses another to do this work unless the defendant owes some duty to sell Old Dutch Cleanser to him.

DEFENDANT'S PRAYER NO. 23.

The defendant prays the court to instruct the jury that even if you should find that the defendant discriminated in price against the plaintiff, unless you also find that the effect of so doing was to substantially lessen competition, or tend to create a monopoly in the field of cleaning preparations adapted for the same general purposes as Old Dutch Cleanser, you must treat such discrimination as lawful.

DEFENDANT'S PRAYER NO. 24.

The defendant prays the court to instruct the jury that it nowhere appears that the defendant ever refused to sell the plaintiff Old Dutch Cleanser.

DEFENDANT'S PRAYER NO. 25.

The defendant prays the court to instruct the jury that even if you should find that the defendant refused to sell the plaintiff Old Dutch Cleanser or discriminated in price against the plaintiff, if you also find that such refusal or discrimination was not undue but was reasonably necessary to preserve the defendant's business and property in the good will and trade name of Old Dutch Cleanser and in the distribution and sale (631) of Old Dutch Cleanser, you must treat such transaction as lawful.

DEFENDANT'S PRAYER NO. 26.

The defendant prays the court to instruct the jury that unless you find that there was some contract, combination, conspiracy, monopoly, attempt to monopolize, or discrimination to which the defendant was actually a party, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 27.

The defendant prays the court to instruct the jury that the defendant, Cudahy Packing Company, does not and cannot control, nor does the evidence show that it seeks to control or monopolize the production of or market for scouring powder or scouring soap or cleaning preparations. The evidence shows that the cleaning preparation which the defendant, Cudahy Packing Company, manufactures constitutes but a small percentage of the scouring powder, scouring soap and cleaning preparations available for the public. The defendant, Cudahy Packing Company, has the exclusive property right in the trade name "Old Dutch Cleanser". The exclusive property right is not a monopoly within the meaning of the Anti-Trust Laws, and no one but the defendant, Cudahy Packing Company, or one having its permission can sell any cleaning preparation under that name. The defendant has a perfect right to use all reasonable means to protect such exclusive right in its trade name, and reasonable efforts to maintain the resale prices on its product are among the means which it may use, provided it does not seek by a combination, contract

or conspiracy to create a restraint of trade or a monopoly, or an attempted monopoly in trade or commerce.

DEFENDANT'S PRAYER NO. 28.

The defendant prays the court to instruct the jury that the mere desire of the vendor or manufacturer to maintain the resale price on his article, with a request (632) to buyers to maintain such resale price, is perfectly lawful, and is not rendered unlawful by the request being accompanied by the understanding, on the part of the buyer, that it is the policy of the manufacturer to quote a higher price to any one who refuses to observe such request.

DEFENDANT'S PRAYER NO. 29.

The defendant prays the court to instruct the jury that if you find that the purpose of the defendant in requesting purchasers to resell at certain prices, and in quoting a lower price to those who complied with its request, was not to restrain trade or attempt to create a monopoly, but was a method adopted by the defendant to protect its own trade name and extend its business without prejudice to its competitors, then the plaintiff is not entitled to recover.

DEFENDANT'S PRAYER NO. 30.

The defendant prays the court to instruct the jury that the mere fact that the exercise of the right of selection of customers may or does tend to keep prices uniform, does not render such selection unlawful or constitute a violation of the anti-trust laws.

DEFENDANT'S PRAYER NO. 31.

The defendant prays the court to instruct the jury that a manufacturer who has created and continues to create and promote a market for his product by its merit, by the use of canvassers, and by an extensive campaign or system of advertising, and who markets his product under a trade name or brand for which he has made and continues to make a market by the foregoing methods, has in such manufacturing business connected with such

trade name or brand and its reputation, created a property the value of which consists in the maintenance of the market so established; that he has a right to protect this property by request to customers to sell the product at certain prices, and he may lawfully quote a higher price to any customer who does not comply with his request but who cuts or lowers the prices of his product.

DEFENDANT'S PRAYER NO. 32.

The defendant prays the court to instruct the jury that a manufacturer who has created and continues to create and promote a market for his product by its merit and by the use of canvassers and by an extensive campaign or system of advertising and who markets his products under a tradename or brand which has become known and valuable by reason of the employment of the foregoing methods, and among other things has regarded it as a matter of good business policy to sell his goods at a higher price compared with his competitors, as an indication of their superior value, may, legitimately, in order to maintain the market for his goods which he has thus acquired, request customers not to sell the product below the established price, and he may properly and lawfully quote a higher price to customers who do not comply with his request, and in so doing he will not be guilty of a violation of any provision of the anti-trust laws.

DEFENDANT'S PRAYER NO. 33.

The defendant prays the court to instruct the jury that the defendant, Cudahy Packing Company, does not and cannot control nor does the evidence show that it seeks to control or monopolize, the production of or the market for scouring powder, or scouring soap, or cleaning preparation. The evidence shows that the cleaning preparation which it manufactures constitutes but a small percentage of the scouring powder and scouring soap and cleaning preparations available for the public. The defendant, Cudahy Packing Company, has the exclusive property right in the trade name "Old Dutch Cleanser". This exclusive property right is not a monopoly within the meaning of the anti-trust laws,

and no one but defendant or one who has lawfully acquired its product can sell a cleaning preparation under that name. The defendant, Cudahy Packing Company, has a perfect right to use all reasonable means to protect such exclusive right in its trade name, and reasonable (634) efforts to maintain the wholesale prices of its product are among the means which it may use, provided it does not seek to create a combination, contract, or conspiracy with others in undue restraint of trade or a monopoly or an attempt to monopolize trade or commerce.

DEFENDANT'S PRAYER NO. 34.

The defendant prays the court to instruct the jury that there is nothing in the anti-trust laws which forbids a manufacturer selling his product to a jobber and placing reasonable restrictions upon the prices at which such jobber shall sell the goods.

DEFENDANT'S PRAYER NO. 35.

The defendant prays the court to instruct the jury that unless you find some arrangement between the defendant and other persons that was undue and beyond what was reasonably necessary to preserve the defendant's business and property in the good will and trade name of Old Dutch Cleanser and in the distribution and sale of Old Dutch Cleanser, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 36.

The defendant prays the court to instruct the jury that unless you find some arrangement between the defendant and other persons that was abnormal and undue and in excess of what normal business usage sanctions for the preservation of the good will and trade name and distribution and sale of a widely-advertised popular trade-marked grocery specialty, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 37.

The defendant prays the court to instruct the jury that if you find that the market for cleaning prepa-

rations, adapted for the same general purposes as Old Dutch Cleanser, was free and open to competing cleaning preparations and to competitors of the defendant and not dominated or controlled by Old Dutch Cleanser or by the (655) defendant, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 38.

The defendant prays the Court to instruct the jury that if you find that Old Dutch Cleanser distributing agents sold Old Dutch Cleanser at the prices listed by the defendant, because they thought such prices fair or they did not wish to give up any of the profit which the list prices afforded them, you must treat such transactions as lawful.

DEFENDANT'S PRAYER NO. 39.

The defendant prays the Court to instruct the jury that if you find that the Old Dutch Cleanser Distributing agents sold Old Dutch Cleanser at the prices listed by the defendant primarily because they thought such prices fair or they did not wish to give up any of the profit which the list prices afforded them, and only secondarily because the defendant had suggested these list prices, you must treat such transaction as lawful.

DEFENDANT'S PRAYER NO. 40.

The defendant prays the Court to instruct the jury that if you find that the Old Dutch Cleanser distributing agents sold Old Dutch Cleanser at the prices listed by the defendant solely because the defendant had suggested these list prices, but wholly without any express or implied obligation or compulsion whatsoever upon them to do so, you must treat such transaction as lawful.

DEFENDANT'S PRAYER NO. 41.

The defendant prays the Court to instruct the jury that unless you find that the defendant imposed on others some express or implied obligation or compulsion to sell Old Dutch Cleanser at the prices listed by the defendant

that amounted to a restraint of trade, you must treat such transaction as lawful.

DEFENDANT'S PRAYER NO. 42.

(626) The defendant prays the court to instruct the jury that a manufacturer who has created and continues to create and promote a market for his product by its merit, by the use of canvassers, and by the use of an extensive campaign or system of advertising, and who markets his product under a trade name or brand which he has made known and respected by the foregoing methods, has in such manufacturing business connected with such trade name or brand and its reputation, created a property, in the maintaining of which he has an interest; that he has a right to protect this property by reasonable means and provisions in the sale of portions thereof, or of the product, so that the purchaser will be bound to use such portions in such ways only as will not injure the seller's business.

DEFENDANT'S PRAYER NO. 43.

The defendant prays the court to instruct the jury that even though you should find that the course of dealing on the part of the defendant, Cudahy Packing Company, in requesting purchasers of Old Dutch Cleanser not to resell below certain prices did to some extent restrain interstate trade and commerce, the defendant, Cudahy Packing Company, would not be liable unless you should also find that such restraint was undue and unreasonable; and in determining whether it was undue and unreasonable, you are to consider whether such course of dealing is injurious to the public and oppressive to individuals and was done with intent to defeat competition and create a monopoly.

DEFENDANT'S PRAYER NO. 44.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents and that by reason thereof the plaintiff lost profits on items other than Old Dutch Cleanser, you must not award to the plaintiff any damages on that account.

DEFENDANT'S PRAYER NO. 45.

(637) The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, if you should also find that the plaintiff's alleged damage resulted from the plaintiff's inability and unwillingness to become a party to that arrangement and to make a profit on Old Dutch Cleanser like other distributing agents who were parties to the arrangement, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 46.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, unless you also find that the plaintiff's alleged damage was directly and actually caused by this arrangement and not by causes unconnected with this arrangement, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 47.

The defendant prays the court to instruct the jury that you must in no event award to the plaintiff any damages for the period subsequent to May 12th, 1915.

DEFENDANT'S PRAYER NO. 48.

The defendant prays the court to instruct the jury that you must in no event award to the plaintiff any damages for the period prior to November, 1914.

DEFENDANT'S PRAYER NO. 49.

The defendant prays the court to instruct the jury that even if you should find that the defendant refused to sell the plaintiff Old Dutch Cleanser or discriminated in price against the plaintiff and that the plaintiff had thereby lost some profits which he otherwise would have made on Old Dutch Cleanser, you must, nevertheless, in arriving at your verdict take into account and allow for the possible reduced price which the plaintiff by his own contention might have sold such Old Dutch Cleanser (638) for and the plaintiff's expense in handling such

Old Dutch Cleanser and the profit the plaintiff has in fact made on Old Dutch Cleanser bought from other sources.

DEFENDANT'S PRAYER NO. 50.

The defendant prays the court to instruct the jury that the plaintiff's own admission in this case shows that the plaintiff had no call for Old Dutch Cleanser from the time the plaintiff ceased to be a distributing agent in 1914 until in or about November, 1914, and in considering the question of damages you will not go back to the latter date.

DEFENDANT'S PRAYER NO. 51.

The defendant prays the court to instruct the jury that the plaintiff cannot recover in this action unless it has established by a preponderance of the evidence, first, that the defendant has done some act forbidden by the Anti-Trust Laws, and, second, that it has thereby been substantially injured in its business or property.

DEFENDANTS' PRAYER NO. 52.

The defendant prays the court to instruct the jury that the plaintiff cannot recover upon an alleged violation of the Sherman Law, which prohibits any contract, combination or conspiracy in restraint of interstate trade or commerce, unless you shall find, by a preponderance of evidence, that the defendant has combined with one or more persons to prevent the plaintiff from purchasing Old Dutch Cleanser. The burden of proving such combination is upon the plaintiff and the mere fact that other jobbers in Baltimore or elsewhere declined to sell the plaintiff Old Dutch Cleanser is not, of itself, any evidence of such combination. The mere fact that the defendant, Cudahy Packing Company, requested other distributing agents to maintain the list price on Old Dutch Cleanser is not, of itself, evidence of such combination. The defendant, Cudahy Packing Company, (639) had the legal right to decline to allow the distributing agents compensation to any jobber who sold Old Dutch Cleanser below the list price, and the mere fact

that the defendant did so is not evidence of a combination in restraint of trade.

DEFENDANT'S PRAYER NO. 53.

The defendant prays the court to instruct the jury that the burden of proof is upon the plaintiff to show some real and actual damage to its business by reason of some unlawful act of the defendant, and unless it proves this damage by a preponderance of evidence the verdict should be for the defendant.

DEFENDANT'S PRAYER NO. 54.

The defendant prays the court to instruct the jury that mere speculation as to the possible profits of a mercantile business cannot be indulged in by the jury for the purpose of finding a verdict in damages. The damages which the law contemplates, and which the act of Congress provides for, must be substantial damages ascertainable upon the evidence presented in the case. There must be facts, transactions, actual evidence of some material and pertinent character relating to the business from which the jury can ascertain with reasonable certainty what damage has actually been worked to the business before any verdict in damages can be returned.

DEFENDANT'S PRAYER NO. 55.

The defendant prays the court to instruct the jury that if the evidence in the case in the matter of damages to the business of the plaintiff has not shown any real or substantial damage, apart from conjecture or mere speculation, then the plaintiff is not entitled to any compensation, and no verdict in damages should be rendered in its favor.

DEFENDANT'S PRAYER NO. 56.

(640) The defendant prays the court to instruct the jury that the estimated future or anticipated profits of a commercial business are too remote, speculative and uncertain to warrant a judgment for their loss. Anyone who seeks to recover anticipated profits, must not only show

the average sales over a period of time sufficient to create a presumption, but must also show the total expenses of every description, including not only the cost of the article, but the cost of effecting the sales including all the disbursements in the business in order to enable the jury to ascertain by facts and figures the net result.

DEFENDANT'S PRAYER NO. 57.

The defendant prays the court to instruct the jury that before you can arrive at any damages, you must first determine whether or not the plaintiff has been injured in his business or property by reason of any act of the defendant forbidden by anything in the anti-trust laws. The injury to his business or property must be real and substantial and based not on speculation but upon facts and circumstances showing the nature and extent of the injury. If the plaintiff's business has not been injured, he cannot recover merely because he believes that it would have been greater or more profitable except for the acts of the defendant.

DEFENDANT'S PRAYER NO. 58.

The defendant prays the court to instruct the jury that this is not a case in which you can find nominal damages for the plaintiff. If the plaintiff has failed to show that he has sustained substantial damages, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 59.

The defendant prays the court to instruct the jury that even if you should find that there was any arrangement between the defendant, Cudahy Packing Company, and certain distributing agents or any discrimination in (641) price against the plaintiff or any refusal to sell the plaintiff Old Dutch Cleanser as alleged by the plaintiff, and that the plaintiff had suffered damages in consequence of such acts or act, nevertheless, the only acts for which the plaintiff may recover anything in this action are such acts as are set forth in the declaration and as were done by the defendant or its agents before May 12th, 1915, when this action was commenced, and

the plaintiff can not recover anything in this action for any damages which are the result of any continuance of such alleged agreement, discrimination, or refusal to sell, if you should find any such, after May 12th, 1915, when this action was commenced, or which are the result of the performance of any acts in furtherance of such alleged agreement, discrimination or refusal to sell, if you should find any such, after May 12th, 1915, when this action was commenced.

DEFENDANT'S PRAYER NO. 60.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangements between the defendant and its distributing agents, or some unlawful discrimination by the defendant against the plaintiff, and, that by reason thereof the plaintiff lost profits which he otherwise would have made on Old Dutch Cleanser, unless you are satisfied by definite and certain evidence how much Old Dutch Cleanser, if any, the plaintiff could have sold, except for that arrangement; and at what price or prices, if any, the plaintiff could have sold such Old Dutch Cleanser, and how much of such Old Dutch Cleanser, if any, the plaintiff could have sold at the full price, except for that arrangement, and how much of such Old Dutch Cleanser, if any, the plaintiff would have sold at a lower price, except for that arrangement, you must not award to the plaintiff any substantial damages on that account.

DEFENDANT'S PRAYER NO. 61.

(642) The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, or some unlawful discrimination by the defendant against the plaintiff and that by reason thereof the plaintiff lost profits which he otherwise would have made on Old Dutch Cleanser, unless you are satisfied by definite and certain evidence how much Old Dutch Cleanser, if any, the plaintiff would have bought, except for that arrangement, and what price or prices, if any, the plaintiff would have paid for such Old Dutch Cleanser, except for that arrangement, and how much Old Dutch Cleanser the plaintiff would have bought at the lower

quantity prices, and how much Old Dutch Cleanser the plaintiff would have bought at the higher prices for smaller quantities, you must not award to the plaintiff any substantial damages on that account.

DEFENDANT'S PRAYER NO. 62.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, or some unlawful discrimination by the defendant against the plaintiff and that by reason thereof the plaintiff lost profits which he otherwise would have made on Old Dutch Cleanser, unless you are satisfied by definite and certain evidence how much Old Dutch Cleanser, if any, the plaintiff has bought from other sources than the defendant and what price or prices the plaintiff has paid therefor and how much Old Dutch Cleanser the plaintiff has bought at the quantity prices and how much Old Dutch Cleanser the plaintiff has bought at the higher prices, you must not award to the plaintiff any substantial damages on that account.

DEFENDANT'S PRAYER NO. 63.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful (643) arrangement between the defendant and its distributing agents, or some unlawful discrimination against the plaintiff by the defendant and that by reason thereof the plaintiff lost profits which he otherwise would have made on Old Dutch Cleanser, unless you are satisfied by definite and certain evidence how much Old Dutch Cleanser, if any, the plaintiff could have sold, except for that arrangement, and how much it would have cost the plaintiff to handle such Old Dutch Cleanser, you must not award to the plaintiff any substantial damages on that account.

DEFENDANT'S PRAYER NO. 64.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agents, the burden of proof is upon the plaintiff to sat-

isfy you as to the price at which in specific transactions the plaintiff, except for such arrangement, would have been able to buy Old Dutch Cleanser from other jobbers; and the measure of damages, if any, is the amount by which this price is exceeded by the price at which the defendant offered to sell to the plaintiff the same quantity of Old Dutch Cleanser.

DEFENDANT'S PRAYER NO. 65.

The defendant prays the court to instruct the jury that even if you should find that there was some unlawful arrangement between the defendant and its distributing agent and that by reason thereof the plaintiff lost profits which he otherwise would have made on Old Dutch Cleanser, you must nevertheless, in arriving at your verdict take into account and allow for the possible reduced price which the plaintiff, by its own contention might have sold such Old Dutch Cleanser for and the plaintiff's expense of handling such Old Dutch Cleanser and the profit which the plaintiff in fact has made upon Old Dutch Cleanser bought from other sources and the profit which the plaintiff might have (644) made had it bought from the defendant Old Dutch Cleanser at the prices actually quoted to the plaintiff by the defendant and had sold such Old Dutch Cleanser at the smaller quantity prices commonly paid by retailers generally.

DEFENDANT'S PRAYER NO. 66.

The defendant prays the court to instruct the jury that even though you should find that the defendant discriminated in price against the plaintiff and that the plaintiff thereby lost some profits which he otherwise would have made on Old Dutch Cleanser, you must, nevertheless, in arriving at your verdict take into account and allow for the profits which the plaintiff might have made had it bought from the defendant at the defendant's general list prices for quantities and at the defendant's general list prices for five case lots and glass.

DEFENDANT'S PRAYER NO. 67.

The defendant prays the Court to instruct the jury that if you find that the benefit accruing to the plaintiff

in consequence of the refusal of the defendant to sell to the plaintiff at the Distributing Agents' price, equalled or exceeded the loss of profits which the plaintiff suffered in respect of Old Dutch Cleanser, your verdict must be for the defendant.

DEFENDANT'S PRAYER NO. 68.

The defendant prays the Court to instruct the jury that the duty rested upon the plaintiff to mitigate any damages which he may have suffered in consequence of not being able to buy of the defendant at the defendant's Distributing Agents' price; and that if the plaintiff, by buying at the General Sales List price, could have made a profit, this profit must be considered in mitigation of the damages to the plaintiff.

(645) 122. The Court erred in that part of its charge to the jury in which it said:

"It is admitted by the plaintiff that with reference to most of the jobbers at least, there was no written and signed agreement on the subject, and none couched in any formal or express terms, although it is in evidence that the defendant, suspecting the firm of Frey & Thomas of York, Pennsylvania, of cutting prices, did ask them to enter into a formal written agreement to maintain prices, which draft of agreement has been offered in evidence, but in that case no agreement was actually formed because Frey & Thomas declined to enter into it, and according to the testimony of Mr. Thomas, they have not been able to buy O. D. C. from defendant since, except at the price at which it was usually sold to retailers."

123. The Court erred in that part of its charge to the jury in which it said:

"A number of jobbers here in Baltimore have testified that they have for years been purchasers of Old Dutch Cleanser from the defendant, and that they had entered into no agreement on the subject, and some of them at least testify that they did not feel under any obligation, either moral or otherwise, to maintain such prices. Many of them said that they always had maintained them, and some of them who so said, did so because they would not have handled the goods at all if

they could not have resold them at a figure at least as high as they received for them, and others give as an additional reason that they are in the habit of respecting manufacturers' wishes as to resale prices. Some of them say that they do not feel that they would be dealing quite fairly with the manufacturer, or with their competitors if they did sell below the resale prices named by the manufacturer."

124. The Court erred in making the following statement to the jury in connection with defendant's exception to that part of the charge which referred to the motives and purposes of the witnesses Schwab, Banghardt, Edgerton and others as regards their selling price of Old Dutch Cleanser:

"Those are all questions of fact. The jury heard the testimony. That is the impression made upon my mind by that testimony, but the jury is free to take any other view they wish."

125. The Court erred in that part of its charge to the jury in which it said:

"There is no question that the defendant, from time to time, issued circulars to the trade, in which such circulars appeared statements like the following:

"Our business and especially, the extension of the trade in these articles depends mainly upon their success in the market, and we therefore consider it essential to make every fair effort to assure to each merchant a steady and reasonable profit. Uniform and fair jobbing and retail prices and trading provisions accomplish this, and we further expect by such uniform sales promotion to gain a practical benefit in increased business to ourselves, to the jobber and to the retail merchant, and to merit their united appreciation, good will and support."

"And then in rather prominent type:

"In relation to wholesalers supplying one another. Important. It is the intent of our selling provisions governing distribution from jobbers' stock (or drop shipments from factory for account of jobber) that the prices provided for different quantity lots, are to govern without exception. If wholesalers should sell other whole-

salers or distributors at an intermediate price between jobbers' cost and the fixed retail price, special prices might thereby gradually be extended to semi-jobbers to (647) the ultimate restriction of our business. Any sales by jobbers at special prices would have no other effect than to enable the purchaser, whether jobber, large retailer or otherwise, to demoralize prices and disturb the entire business in these products. To prevent this (and the following appears in red type) it is therefore essential that we be the only ones to decide who is to buy at wholesale prices (there the red ink ends) and it is for that reason the jobbers' sales to other jobbers and distributors should be strictly at our published retail list, or in other words, at the same price at which the jobber would sell to any retailer. This is a matter of so much importance that we deem it essential to bring it prominently to your notice by this means.'

"And then in red type in the same circular appears:

" 'Old Dutch Cleanser and Dutch Hand Soap will be sold at jobbers' prices to only such jobbers as strictly observe the retail selling prices in this list in all of their resales, whether to their regular retail trade or to other jobbers and distributors.' "

"The quotations I have made are in evidence in circular dated October 1, 1912. There is another one in evidence dated January 1, 1910, but it appears in respects mentioned to be substantially, I think, verbally identical with the one of October 1, 1912. These quotations are from a circular which is called 'Selling Price to Retailers.' The same notice appears in a circular marked 'Jobbers' Cost' issued by the defendant under date of January 1st, 1910. On April 6th, 1914, there is in evidence a circular issued by defendant and called "Distributing Agents' Compensation." In this circular it is stated:

"For the most practical and economical merchandising and distribution to the trade we appoint distributing agents, the same being taken from business houses doing exclusive jobbing trade. To insure the availability and (648) success of their work, and of our important and constant national advertising, as well as in the interest of the trade, uniformity and equality, as to terms, delivery and price is essential. It is therefore required of

our distributing agents that they fully co-operate with us in this direction, as per terms, conditions and prices laid down in our published General Sales List. The goods that we deliver to our distributing agents are for sale to our mutual retail trade, and is not intended that our distributing agents sell same to other wholesalers, as we are prepared to distribute through them in all cases on the terms and conditions of our published Sales Provisions. We especially desire to point out that this remuneration to our distributing agents may not be given away by them wholly or in part, to any class of trade, either jobbers, semi-jobbers, retailers, or consumers. All quotations, bids, sales and invoices should be at a rate not lower than laid down in our Published General Sales List. Quantity orders should not be booked or deliveries made, excepting to one buyer at one time, and distributing agents should not entertain orders where pooling is known or probably exists. Discount: Not more than two per cent for cash for remittance received within the cash discount period should be allowed. Cash discounts should not be allowed from quotations, bids or orders, nor should it be deducted from invoice on the assumption that the customer will pay cash.'

"There can be of course, no question here that the defendant did all that it could to make dealers believe that it would refuse to sell them except at the price at (649) which any retailer could buy, if they did not in all respects maintain the price list that it fixed, and it is in evidence that it did refuse to sell jobbers whom it believed were not maintaining these resale prices, and on every bill sent to a wholesaler by the defendant there appears to have been stamped a notice that 'All your quotations, bids, sales and invoices for Old Dutch Cleanser either to jobbers, semi-jobbers, retailers or consumers, should be at a rate not lower than laid down in our published General Sales List.'"

126. The Court erred in making the following statement to the jury in connection with defendant's exception to that part of the charge which referred to circulars, price lists and papers, superseded prior to the transactions complained of:

"If the jury find that they have been superseded, yes. I read one that was of April 6, 1914, and the next one of October, 1912, and it seemed to me, though it is for the jury to say as a matter of fact, that there had been no change in that system from the first of January, 1910, until April 6, 1914."

127. The Court erred in that part of its charge to the jury in which it said:

"I should say a word here perhaps, about the phrase 'distributor' which appears, some time between October, 1912, and April, 1914, to have been substituted by defendant in advertising literature for the phrase jobber. So far as the testimony has disclosed, and so far as any of the jobbers who have testified are concerned, the change was a change in name only. The goods were sold to so-called distributing agents just as they had been sold to jobbers, and I do not think you need pay any attention whatever to such a change of name."

(650) 128. The Court erred in that part of its charge to the jury in which it said:

"It sold for years to the plaintiff and it stopped selling plaintiff at the prices at which it had been selling to plaintiff and at which they continued to sell to the other jobbers in Baltimore to whom they had previously been selling, and it is perfectly clear from Mr. Frey's testimony, and from the correspondence that passed between him and the defendant's agents, that no other complaint was made against him, except that he had cut the re-sale prices. You may reasonably conclude that if there had been any other reason whatever for cutting him off, defendant would have offered evidence to show the existence of such reason, but none such was offered. I think you will be entirely justified in finding that the refusal to sell, if you shall find a refusal, or a discrimination against Frey, if you regard what the defendant did as a discrimination rather than a refusal, was due entirely to defendant's belief that Frey had cut prices and was likely to continue so to do. Was such cutting off, and if you shall find that he was, and such was the reason for their refusal to sell him at less than the price at which sales were made to retailers, you will have to inquire

whether such action was taken by them in furtherance of the combination to maintain resale prices, if you shall find the existence of such combination. If one large wholesale jobber cuts prices on any considerable scale, quite obviously his competitors, the other wholesale jobbers, will have to do the same or cease to deal in the article. If there was any such combination, you may hold that it was necessary for its maintenance that defendant should in some way stop any large jobber from cutting prices, if it could, and you may therefore have little difficulty in holding that it was for the purpose of maintaining the re-sale prices fixed by it that it dealt with the plaintiff as it did."

(651) 129. The Court erred in that part of its charge to the jury in which it said:

"In this case, however, there is not so much dispute as to ultimate facts perhaps, as there is to the inference which can reasonably be drawn from the facts. Now the defendant say it never did refuse to sell plaintiff. It certainly did always offer to sell him Old Dutch Cleanser at the price at which, according to its sales plan, wholesale grocers like himself, resold the Old Dutch Cleanser to retailers or other persons. Plaintiff says that was intended to be a refusal, and in fact was so. Quite clearly if defendant had said to the plaintiff that he could have Old Dutch Cleanser at \$5.00 a case it would have refused to sell him because it would have known perfectly well that the plaintiff could not pay such a price for that article to sell again, so that there may be a refusal which takes the form of the naming of a price, which the person naming it knows to be prohibitory. Now in this case defendant did offer to sell plaintiff Old Dutch Cleanser at a price at which, buying in large quantities, it could if it had sold in very small lots, had made some profit, for the re-selling price to retailers in one case lots is \$3.40 and in over 250 case lots it was \$3.20, which latter price was that which defendant quoted to plaintiff. It will be for you to say, under all the facts and circumstances of the case as they are in evidence, whether you believe that the defendant in naming the price it did to plaintiff desired and intended to prevent him from obtaining goods, or whether it merely sought and intended to get from him a higher price for its goods

than it was willing to sell them for to other persons in like case. If you think its purpose was to keep him from getting the goods, it was a refusal. If you think its real purpose was to sell him the goods, but at a higher price than it charged others in like cases, it would be a discrimination."

(652) 130. The Court erred in that part of its charge to the jury in which it said:

"This suit was brought in May, 1915, two years ago. Plaintiff thinks it is entitled to damages not only for the period before the suit was brought, but for these two years. The question of law is a close one and I shall ask you therefore in your verdict, if you shall find for the plaintiff, to find that its damages up to the date of the bringing of the suit were so much, say for illustration \$1,800, but only for illustration, and that for the two years since the bringing of the suit, in which time you will find he would have sold between five thousand and six thousand cases, that his damages were so much. In each case, you understand, you first ascertain what the actual damage is, and multiply it by three."

131. The Court erred in that part of its charge to the jury in which it said:

"The second count charges the violation of the Clayton Act, which makes it unlawful for any person engaged in commerce in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, where the effect of such discrimination may be to substantially lessen competition, or tend to create a monopoly in any line of commerce. There is no question that defendant did charge plaintiff more for Old Dutch Cleanser than it charged others in like line of business with plaintiff, and if you shall find, as from the evidence you may very well find, that the intent of such discrimination was to maintain the resale prices fixed by the defendant, you may well find that the effect of such discrimination was to substantially lessen competition, as you may find in view of the repeated warnings given by defendant in its literature that the discrimination against plaintiff would

operate to make other jobbers and wholesalers fearful to indulge in any competition in price in this article."

(653) 132. The Court erred in that part of its charge to the jury in which it said:

"The statute itself is to be read, as the Supreme Court has told us, in the light of reason, but there are certain kinds of contracts and combinations which the Supreme Court, as I understand it, has held to be contracts in unreasonable restraint of trade, and if a contract or combination belongs to that class, the fact that in a particular given case the Court or jury may think that the result of the combination or contract would on the whole be beneficial rather than harmful, will not justify it, and as I understand the decision of the Supreme Court, any agreement having for its sole purpose the destruction of competition, and the fixing of prices is injurious to the public interests and void."

133. The Court erred in making the following statement to the jury in connection with defendant's exception to that part of the charge which stated in substance that had the defendant refused to sell the plaintiff that would have constituted a violation of the Anti-Trust Laws:

"If he refused to sell it with the purpose of furthering a scheme to maintain prices."

134. The Court erred in that part of its charge to the jury in which it said:

"I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act."

(654) "I should say, and perhaps I have already said it, that a combination, contract, agreement, conspiracy, or whatever you choose to call it, does not have to be made in any formal way. If you know that I want you to do something and you know I will not deal with you unless you do do that something, and you keep on doing it, there may be an agreement between us to do that very thing, though never a word has been said. In other words, you will understand that if the persons were actually, deliberately, each knowing the purpose of the other, co-operating and working together to obtain the same result, then you can find that the agreement, or whatever you choose to call it, existed."

135. The Court erred in that part of its charge to the jury in which it said:

"I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act."

136. The Court erred in that part of its charge to the jury in which it said:

"Now, how are you to determine how much Old Dutch Cleanser the plaintiff would have sold if he had had the (655) chance to sell any? Well, during the three years preceding the time at which defendant took plaintiff off its preferred list, as it calls it, plaintiff had bought and substantially sold some 6,653 cases, or an average of over 2,200 cases a year. The total volume of its business in all lines during that time averaged something like One Million, three hundred thousand dollars a year, and during the period intervening between the time defendant took the action complained of and the institution of this

suit, defendant was doing a business of perhaps one million and a half a year. You may not unnaturally conclude, in view of the high public favor in which the evidence seems to show that Old Dutch Cleanser is held, that plaintiff's sales of Old Dutch Cleanser would have increased proportionately to that of the rest of his business. That is to say, that if plaintiff sold something in excess of 2,500 cases a year of Old Dutch Cleanser during the period elapsing between the cutting off and the bringing of this suit, somewhere upwards of 3,000 cases, and if you shall so find, and you are not bound to, it is entirely in your sound business judgment, you will have to determine what profit plaintiff would have made on such volume of business."

137. The Court erred in that part of its charge to the jury in which it said:

"He paid about \$2.95 a case for it, less 2% discount. There were some 103 cases which he resold at practically no profit, and he claims he sold most of the other 6,653 cases at \$3.40 a case. He admits that there was some cutting. He thinks it was made with only five customers. He is not able to tell what quantity these five customers took. As to them it was sold as low as \$3.15. He has said he sold almost exclusively in one case lots, but defendant has produced a large number (656) of orders which tend to show that he may be mistaken as to the small proportion of five case lots ordered by his customers. However, that may be, the testimony would seem to indicate that his average profit on what he sold was not more, and you may think if he had been able to obtain it, would not have been less than Twenty Cents a case, which on 3,000 cases, which you may estimate as the quantity he would have sold between the time he was cut off and the bringing of this suit, if he had the chance to make such sales, would be \$600. If you think that he would have obtained a higher average profit, you will increase the estimate of his damage accordingly. Of course if you think his profit would have been smaller, you will cut it down. After you have ascertained the actual damage, the law requires you to multiply it by three. If, for example, you find that the plaintiff's actual damage was \$600, and decide that he is en-

titled to recover therefor, you multiply that \$600 by three, and return a verdict for \$1,800."

138. The Court erred in denying and overruling the motion made by the defendant to set aside the verdict and for a new trial.

139. The Court erred in overruling the demurrer interposed by the defendant to the third and fourth counts of plaintiff's declaration on the ground that the jurisdiction of the acts complained of was and is committed to the Federal Trade Commission and said counts did not aver that the jurisdiction of said Federal Trade Commission had been invoked or exercised.

140. The Court erred in overruling the demurrer interposed by defendant to the first, second, third, and fourth counts of plaintiff's declaration on the ground that they and each of them were bad in substance and insufficient in law.

141. The Court erred in denying and disallowing the demand made by the defendant for a bill of particulars of the plaintiff's claim as follows:

1. At what times other than February 4, 1914, and March 12, 1915, the defendant refused to sell to the plaintiff.

2. Where, through whom, and under what circumstances the defendant refused to sell to the plaintiff.

3. When, where, through whom, and under what circumstances the defendant made or attempted to make any alleged resale contract or contracts with the plaintiff.

4. The names and addresses of the jobbers, wholesale grocers and grocers with whom the defendant made any alleged resale contract or contracts.

5. Whether such alleged resale contract or contracts with jobbers, grocers and wholesale grocers were oral or written.

6. When, where, through whom, and by what acts the defendant has tried to prevent jobbers, grocers and wholesale grocers from selling to the plaintiff, and the names and addresses of such jobbers, grocers and wholesale grocers.

7. The names and addresses of and the number of persons previously customers of the plaintiff who have gone to other grocers or wholesale grocers for goods other than Old Dutch Cleanser because of the defendant's (G58) alleged acts preventing plaintiff from selling Old Dutch Cleanser.

8. The amount of profits on Old Dutch Cleanser lost to the plaintiff because of the defendant's alleged acts, and the amount of profits on other goods, the sale of which is alleged to have been prevented by the said acts.

9. At how much less than the defendant's price to retailers Old Dutch Cleansers can be sold at a fair profit, and at what price the plaintiff sold Old Dutch Cleanser to retailers.

10. In what manner and to what extent the plaintiff was damaged in and about its business as a wholesale grocer by defendant's alleged refusal to sell to the plaintiff, giving specific instances of such damage.

11. Upon what statute or statutes each count is based, giving this information separately for each count.

Wherefore the said Cudahy Packing Company prays that the judgment in said cause, for the errors aforesaid, may be reversed by the United States Circuit Court of Appeals for the Fourth Circuit and that such other and further relief may be granted as may seem proper.

CUDAHY PACKING COMPANY,
By GILBERT H. MONTAGUE,

Its Attorney,
c o Washington Bowie, Jr.,
Fidelity Building,
Baltimore, Md.

**STIPULATION OF COUNSEL AS TO CONTENTS OF
RECORD AND STIPULATION TO BE GOVERNED
BY RULE 23 OR THE U. S. CIRCUIT COURT
OF APPEALS.**

(659)

Filed August 29, 1917.

It is stipulated and agreed by and between the parties hereto that the transcript of record on defendant's appeal to the United States Circuit Court of Appeals for the Fourth Circuit in the above entitled case shall consist of the following:

1. Declaration filed May 10, 1915.
 2. Defendant's demurrer to third and fourth counts of declaration.
 3. Opinion of Court overruling defendant's demurrer to third and fourth counts of declaration.
 4. Order of Court overruling defendant's demurrer to third and fourth counts of the declaration.
 5. Defendant's demurrer to the first, second, third and fourth counts of the declaration.
 6. Order of Court overruling defendant's demurrer to the first, second, third and fourth counts of the declaration.
 7. Defendant's demand for a bill of particulars of plaintiff's claim.
- (660) 8. Plaintiff's exceptions to demand for bill of particulars.
9. Order of Court sustaining exceptions and disallowing the demand of the defendant for a bill of particulars.
 10. Plea to the declaration with a notation by the clerk that issue was joined on said plea.
 11. Impannelling of jury, verdict and judgment.

12. Amended declaration filed by leave of the Court in open court at the trial.

13. Order of Court May 25th, 1917, "all pleadings to first declaration to be considered as being in as to the amended declaration,

14. All petitions, agreements and orders of Court about extending time for signing and sealing bills of exception.

15. Bills of exception.

16. Assignment of Errors.

17. Stipulation of counsel to be governed by rule 23 of the United States Circuit Court of Appeals for the Fourth Circuit.

18. The clerk's memorandum stating the date of the petition for writ of error, date of order granting the writ of error, date of the writ of error, and date when copy thereof was lodged with Clerk of this Court for adverse party; the date, penalty, names of obligors, and the conditions of the appeal bond; the date of citation and date of service thereof or waiver of service thereof.

19. This stipulation and such other merely formal matters as is necessary.

HORACE T. SMITH,

DANIEL W. BAKER,

Attorneys for Plaintiff.

GILBERT H. MONTAGUE,

Attorney for Defendant.

STIPULATION OF COUNSEL AS TO TRANSCRIPT OF RECORD.

(661) Counsel for the plaintiff and for the defendant in the above entitled case.

Hereby stipulate and agree to be governed by Rule 23 of the United States Circuit Court of Appeals for

the Fourth Circuit on defendant's writ of error to the said court.

HORACE T. SMITH,
DANIEL W. BAKER,
Attorneys for Plaintiff.
GILBERT H. MONTAGUE,
Attorney for Defendant.

MEMORANDUM OF THE CLERK.

(662) (1) Petition for Writ of Error, filed 20th day of August, 1917.

(2) Writ of Error granted 20th day of August, 1917.

(3) Writ of Error Bond, dated 20th day of August, 1917.

Penalty: \$6,000.00.

Obligor: Fidelity and Deposit Company of Maryland. Conditioned for Damages and Costs.

(4) Writ of Error, dated 20th day of August, 1917.

(5) Copy of Writ of Error for adverse party lodged with Clerk.

(6) Citation. Dated 20th day of August, 1917.

(Acknowledgment of service dated 20th day of August, 1917.)

ORDER TO TRANSMIT RECORD.

(663) In pursuance of the writ of error aforesaid, and according to the statute in such case made and provided, and of the Order of Court here, a record of the judgment aforesaid, with all things thereunto relating, together with the said writ of error annexed, is hereby transmitted to the said United States Circuit Court of Appeals for the Fourth Circuit, accordingly.

Teste: ARTHUR L. SPAMER, Clerk.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,

District of Maryland, to-wit:

I, Arthur L. Spamer, Clerk of the District Court of the United States for the District of Maryland, do hereby certify that the foregoing is a true transcript of the record and proceedings of the said District Court, together with all things thereunto relating, made up in accordance with the stipulation of counsel, incorporated therein, in the therein entitled case.

In Testimony Whereof, I hereunto set my hand and affix the seal of said District Court, this 21st day of September, 1917.

(Seal of Court)

ARTHUR L. SPAMER, Clerk.



(549) On the same day, to-wit, September 25, 1917, the original petition for writ of error, order allowing writ of error, writ of error, writ of error bond, and citation are certified up under Sec. 7 of Rule 14.

Same day, the appearance of Gilbert Montague is entered for the Plaintiff in Error.

October 2, 1917, the appearance of Daniel W. Baker and Horace T. Smith is entered for the Defendant in Error.

November 24, 1917, twenty-five copies of the printed record are filed.

**ORDER EXTENDING TIME FOR FILING OF DEFENDANT
IN ERROR'S BRIEF.**

Filed December 24, 1917.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

vs.

Frey & Son, Incorporated, a corporation, Defendant in
Error.

Error to the District Court of the United States for the
District of Maryland, at Baltimore.

Upon Application of the Defendant in Error, by its

Attorney, Horace T. Smith, and for good cause shown.

It is Ordered that the time for the filing of the brief for the Defendant in Error in the above case, be, and the same is hereby, extended to December 31, 1917.

MARTIN A. KNAPP,
U. S. Circuit Judge.

Dec. 24, 1917.

ARGUMENT OF CAUSE.

January 15, 1918 (January Term, 1918), cause came on to be heard before Pritchard, Knapp and Woods, Circuit Judges, and is argued by counsel and submitted.

ORDER GRANTING LEAVE TO COLGATE & COMPANY TO FILE BRIEF AMICUS CURIAE.

(550)

Filed March 2, 1918.

UNITED STATES CIRCUIT COURT OF APPEALS.
FOURTH CIRCUIT.

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

vs.

Frey & Son, Incorporated, a corporation, Defendant in
Error.

Error to the District Court of the United States for the
District of Maryland, at Baltimore.

Upon the Application of Colgate & Company, by its
Counsel, and for good cause shown,

Leave is hereby granted to Charles Wesley Dunn, Esq., and Charles E. Hughes, Esq., Counsel for Colgate & Company, to file a brief as *Amicus Curiae* in the above case on or before March 12, 1918.

MARTIN A. KNAPP,

U. S. Circuit Judge.

March 2, 1918.

**ORDER GRANTING LEAVE TO UNITED STATES TO FILE
REPLY BRIEF AMICUS CURIAE.**

Filed March 26, 1918.

**UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.**

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

vs.

Frey & Son, Incorporated, a corporation, Defendant in
Error.

Error to the District Court of the United States for the
District of Maryland, at Baltimore.

Upon the Application of the United States, by Henry
S. Mitchell, Special Assistant to Attorney General, its
(551) Counsel and for good cause shown,

Leave is hereby granted to the United States to file
a brief as *Amicus Curiae* in the above case, in reply to
brief filed by Colgate & Company, on or before April 8,
1918.

MARTIN A. KNAPP,

U. S. Circuit Judge.

March 26, 1918.

ORDER RESTORING CAUSE TO DOCKET FOR A RE-ARGUMENT TO BE HAD AT THE OCTOBER TERM, 1918.

Filed and Entered July 27, 1918.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

vs.

Frey & Son, Incorporated, a corporation, Defendant in
Error.

Error to the District Court of the United States for the
District of Maryland, at Baltimore.

For Reasons appearing to the Court,

It is Ordered that this cause be, and the same is hereby, restored to the docket for a re-argument to be had at the October Term, 1918.

J. C. PRITCHARD,
U. S. Circuit Judge.

July 27, 1918.

**ORDER POSTPONING RE-ARGUMENT OF CAUSE TO
JANUARY TERM, 1919.**

Filed and Entered October 7, 1918.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

vs.

Frey & Son, Incorporated, a corporation, Defendant in
Error.

Error to the District Court of the United States for the
District of Maryland, at Baltimore.

(552) For Reasons appearing to the Court,

It is Ordered that the re-argument ordered in this
cause to be had at the present term, be, and the same is
hereby, postponed until the January Term, 1919.

MARTIN A. KNAPP,
U. S. Circuit Judge.

October 7, 1918.

January 21, 1919, the appearance of Charles Markell
is entered for the Defendant in Error.

RE-ARGUMENT OF CAUSE.

January 21, 1919 (January Term, 1919), cause came
on to be heard before Pritchard, Knapp and Woods, Cir-
cuit Judges, and is re-argued by counsel and submitted.

OPINION.

(553)

Filed July 16, 1919.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,*versus*Frey & Son, Incorporated, a corporation, Defendant in
Error.

In Error to the District Court of the United States for
the District of Maryland, at Baltimore.

(Re-argued January 21, 1919. Decided July 16, 1919.)

Before PRITCHARD, KNAPP and WOODS, Circuit Judges.

GILBERT H. MONTAGUE (JOSEPH W. GOODWIN and THOMAS
CREIGH on brief) for plaintiff in error, and CHARLES
MARKELL and HORACE T. SMITH (DANIEL W. BAKER
on brief) for defendant in error. (CHARLES E.
HUGHES, CHARLES WESLEY DUNN and MASON
TROWBRIDGE on brief) for Colgate & Co., as
amici curiae, and HENRY S. MITCHELL,
Special Assistant to the Attorney General,
(G. CARROLL TODD, Assistant to the At-
torney General, on brief) for the
the United States as *amici*
curiae.

WOODS, Circuit Judge:

(554) In this action for damages under the federal statute forbidding combinations and discrimination in restraint of trade the District Judge refused to direct a verdict for the defendant and the plaintiff recovered judgment. Exceptions were taken at almost every step of the trial; but the vital question on which all others turn is whether the testimony, viewed most favorably to plaintiff, tended to prove an unlawful combination or unlawful discrimination to which the defendant was a party. There was a mass of testimony and a great number of objections to its introduction, and the case comes here on one hundred and forty-one assignments of error covering eighty-five pages of the record; but there was so little real conflict in the testimony on the vital issue that except on the measure of damages the case might well have been tried without prejudice on the following as an agreed statement of facts: The defendant manufactured and sold Old Dutch Cleanser and developed a large trade in that article by extensive advertisements in newspapers and magazines and by circulars and solicitors. Considering the maintenance of a fixed price necessary to an adequate profit, defendant adopted the following means of promoting sales and maintaining the wholesale price: It sold only to jobbers and wholesalers, who were expected to sell only to retailers. Soliciting agents were sent to retail merchants and orders taken from them at the list price to be transmitted to any jobber that the retailer named of the jobbers to whom the defendant was selling. These jobbers selected by defendant though called distributing agents were purchasers to whom defendant sold at a fixed deduction or discount from the list price. This discount was intended as the jobber's profit. By circulars and personal interviews jobbers were insistently exhorted to maintain the fixed prices in their own interest and that of the defendant. The jobbers knew they were expected to maintain (555) the prices fixed by the defendant and that they were liable to be cut off if they refused. There was occasional underselling by dealers and perhaps occasional disregard by the defendant of isolated acts of underselling. But the plan of the defendant was generally acquiesced in by jobbers, and its request or demands that

the prices he maintained were generally complied with. There was no formal written or oral agreement with jobbers for the maintenance of prices.

The plaintiff was a jobber on defendant's list of "distributing agents" who had a considerable trade in Old Dutch Cleanser. Believing that by the elimination of certain expenses usually incident to the wholesale business, it could afford to sell Old Dutch Cleanser at less than the price enjoined by defendant, plaintiff reduced the price below that fixed by defendant. For that reason the defendant refused to sell plaintiff at its usual discount from the list price, thus cutting off its business by making it impossible for it to compete with other jobbers at a profit.

The vital question is whether defendant's method of business coupled with the acquiescence of its customers therein by observing its requests or demands to maintain prices was such co-operation between seller and purchasers as amounted to a combination in restraint of trade within the rule laid down in *Dr. Miles Medical Company v. Park & Sons Company*, 220 U. S. 373, and other following cases. We are obliged to hold that the question has been clearly answered in the negative by the Supreme Court in *United States of America v. Colgate & Company*, decided June second, 1919. The court expressly held that the announcement in advance that customers were expected to charge a price fixed by the seller and that the penalty for refusal to maintain prices would be refusal to sell to the offending customer, observance of the request to maintain prices by customers (556) generally, and the actual enforcement of the penalty by refusal to sell to such customers as failed to maintain the price did not constitute a violation of the trust statute. Nothing more was done by the defendant and its customers in this case.

Since the defendant, under the Colgate case, merely exercised the right reserved by the Clayton Act to dealers of "selecting their own customers in *bona fide* transactions and not in restraint of trade," the plaintiff cannot recover under its charge of unlawful discrimination in price.

Reversed.

JUDGMENT.

(557) Filed and Entered July 16, 1919.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

vs.

Frey & Son, Incorporated, a corporation, Defendant in
Error.

In Error to the District Court of the United States for
the District of Maryland.

This Cause came on to be heard on the transcript of
the record from the District Court of the United States
for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered
and adjudged by this Court that the judgment of the said
District Court, in this cause, be, and the same is hereby,
reversed with costs; and that this cause be, and the same
is hereby, remanded to the District Court of the United
States for the District of Maryland, at Baltimore, with
directions to set aside the verdict and grant a new trial in
accordance with the opinion of this Court.

C. A. WOODS,
U. S. Circuit Judge,

July 16, 1919.

**PETITION OF DEFENDANT IN ERROR FOR A
REHEARING.**

(558) Presented August 14, 1919.

**IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.**

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

versus

Frey & Son, Incorporated, a corporation, Defendant in
Error.

In Error to the District Court of the United States for
the District of Maryland, at Baltimore.

*To the Honorable United States Circuit Court of Ap-
peals for the Fourth Circuit:*

The defendant in error (plaintiff below) respectfully makes this application for a rehearing of this case and for a modification of the order of this Honorable Court herein to the extent and for the purposes and for the reasons following:

1. On the 16th day of July, 1919, this Honorable Court filed herein its opinion and order, and, for the reasons set forth in its said opinion did, by its said order, (559) reverse the judgment of the District Court in favor of the plaintiff below (defendant in error here). As

is more fully stated in said opinion of this Honorable Court, the reason for said reversal was that, in the opinion of this Honorable Court, the evidence was legally insufficient to entitle the plaintiff below to recover and, therefore, a verdict for the defendant should have been directed below. Notwithstanding this view of this Honorable Court as to the legal insufficiency of the evidence, it is necessary, under the practice of this Honorable Court and under the decision of the Supreme Court of the United States in the case of *Slocum vs. New York Life Insurance Company*, 228 U. S. 364, that the order of reversal award a new trial, unless the defendant in error (plaintiff below) consent to abandon such right to a new trial and consent to the entry in this Honorable Court of a final judgment reversing the judgment below and entering judgment absolute in favor of the defendant.

2. The defendant in error herein (plaintiff below), although unable to concur in the reasoning of this Honorable Court in its said opinion, nevertheless does concur with this Honorable Court in the view that there was little real conflict in the testimony on the material issues. The defendant in error (plaintiff below) is further satisfied that its case was fully presented by the evidence submitted at the trial below and on the present record; that no additional material evidence could be produced at a new trial, and that the rights of the parties can be fully and fairly adjudicated on the present record; whereas a new trial, followed by successive writs of error, would be burdensome and expensive and would serve no useful purpose whatever in the administration of justice. The defendant in error (plaintiff below) therefore, not waiving its right to a review of the error which it respectfully submits is involved in the decision of this Honorable Court as to the legal sufficiency of the evidence, nevertheless desires to waive its right to a new trial below and to consent to an entry of final judgment (560) herein, to the end that needless time and expense may be saved, and that from the entry of final judgment herein a writ of error may forthwith be prosecuted to the Supreme Court of the United States, for the purpose of reviewing the substantial question involved in the decision of this Honorable Court, and of correcting what the defendant in error believes to be the manifest error involved in said decision of this Honorable Court.

3. In thus consenting to and requesting the entry of final judgment in this Honorable Court, in lieu of a judgment of reversal carrying with it a right to a new trial, the defendant in error (plaintiff below) asks only that this Court take the action which was taken by the United States Circuit Court of Appeals for the Second Circuit on a similar request under similar circumstances in the case of *Thomsen vs. Cuyser*, 243 U. S. 66. In the case just cited, the Supreme Court of the United States upheld the propriety of such action, and held that such action resulted in a final judgment reviewable on writ of error, and that such consent by the plaintiff below to entry of final judgment was not a waiver of the right of further review in the Supreme Court of the United States, but was sufficient to justify entry of final judgment without a new trial, thus leaving open for review only the substantial questions involved in the reversal by the Circuit Court of Appeals of the judgment of the District Court.

4. This case having already been twice argued before this Honorable Court, and this Honorable Court having expressed its deliberate opinion on the substantial questions involved, your petitioner deems it useless to ask a general reargument of this case before this Honorable Court. For this reason no extended discussion is here presented of the reasons why your petitioner respectfully considers the judgment of this Honorable Court erroneous. Such reasons are those fully set forth in the briefs heretofore filed herein and in the letters from counsel to this Honorable Court, submitted after (561) the decision of the Supreme Court of the United States in the *Colgan* case. Reference is hereby made to said briefs and to said letters from counsel for a statement of the reasons why your petitioner deems the decision of this Honorable Court erroneous. Your petitioner, however, does not ask a general reargument, but only asks a rehearing to the end that the order of this Honorable Court may be modified to the extent and for the purposes herein set forth.

Wherefore, your petitioner, defendant in error (plaintiff below), respectfully prays that a rehearing may be granted in this case and that, on such rehearing, the order of this Honorable Court may be so modified that, instead of a simple order of reversal (carrying with

it, of necessity, the right to a new trial), this Court may enter a final judgment, reversing the judgment below and entering judgment absolute for the defendant (plaintiff in error here), or directing entry of such judgment below; and your petitioner hereby expressly consents to the entry of such final judgment and waives all right to a new trial below, but at the same time reserves, and does not waive, the right of review, by writ of error to the Supreme Court of the United States, of the errors (not including such failure to award a new trial) involved in the judgment of this Honorable Court.

And as in duty bound, your petitioner will ever pray,

HORACE T. SMITH,
CHARLES MARKELL,
Counsel for Petitioner.

We hereby certify that the foregoing petition for rehearing is, in our opinion, well founded in law, and is not intended for delay.

HORACE T. SMITH,
CHARLES MARKELL,
Counsel for Petitioner.

**PETITION OF DEFENDANT IN ERROR FOR A STAY OF
THE MANDATE.**

(562)

Filed August 14, 1919.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

VERSUS

Frey & Son, Incorporated, a corporation, Defendant in Error.

In Error to the District Court of the United States for the Fourth Circuit.

To the Honorable United States Circuit Court of Appeals for the Fourth Circuit:

The petition of the defendant in error (plaintiff below), respectfully shows:

1. That it is herewith filing its petition for a rehearing of this case and for a modification of the order of this Honorable Court, filed herein on July 16th, 1919, to the extent and for the purposes and reasons set forth in said petition;

2. That under Rule 29 of this Honorable Court, such petition will not operate to stay the mandate or other process provided for in Rule 32, except by special order of the Court; and that under Rule 32, such mandate or other process will issue, as of course, after the expiration of thirty days from the date of the judgment of this Court (July 16th, 1919), unless otherwise ordered;

3. That in view of the nature of such petition for rehearing and modification and the end sought to be accomplished thereby no useful purpose would be subserved if the mandate or other process of this Honorable Court should issue before the Court has disposed of such petition but would cause unnecessary complications and delay.

Wherefore, your petitioner prays that the mandate (563) or other process of this Honorable Court be stayed and withheld until this Honorable Court finally acts upon such petition for rehearing and modification.

HORACE T. SMITH,
Counsel for Petitioner

ORDER STAYING MANDATE.

Filed August 20, 1919.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

vs.

Frey & Son, Incorporated, a corporation, Defendant in
Error.

Error to the District Court of the United States for the
District of Maryland, at Baltimore.

Upon the Application of Defendant in Error, by its
Attorney, and it appearing that a petition for a rehearing
has been presented in this cause,

It is Ordered that the mandate of this Court in this
cause be, and the same is hereby, stayed pending the ac-
tion of the Court upon the said petition for a rehearing.

C. A. WOODS,
U. S. Circuit Judge.

August 20, 1919.

**ORDER GRANTING REHEARING AND JUDGMENT RE-
VERSING JUDGMENT OF DISTRICT COURT WITH-
OUT A NEW TRIAL, &C.**

(564) Filed and Entered October 7, 1919.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1571.

The Culahy Packing Company, a corporation, Plaintiff
in Error,

vs.

Frey & Son, Incorporated, a corporation, Defendant in
Error.

Error to the District Court of the United States for the
District of Maryland, at Baltimore.

A petition for a rehearing of this case and for a modification of the order of this Court having been filed herein by counsel for the defendant in error; upon consideration thereof, it is

Ordered, That said petition be and hereby is granted;

It is Further Ordered, That the order of this Court filed and entered herein on July 16th, 1919, be and hereby is vacated and set aside and that the judgment of the District Court of the United States for the District of Maryland, be, and hereby, is reversed, without a new trial, with costs to the plaintiff in error (defendant below), and that this cause be remanded to said District Court with instructions to enter a judgment for the plaintiff in error (defendant below) for costs.

It is Further Ordered, That a mandate issue accordingly.

J. C. PRITCHARD,
MARTIN A. KNAPP,
C. A. WOODS,

U. S. Circuit Judges.

Oct. 7, 1919

PETITION FOR WRIT OF ERROR.

(365)

Filed October 13, 1919.

**IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.**

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

vs.

Frey & Son, Incorporated, a corporation, Defendant in
Error.

To the Honorable Judges of the United States Circuit
Court of Appeals for the Fourth Circuit:

Your petitioner, Frey & Son, Incorporated, a corporation, plaintiff below and defendant in error in the above entitled case, respectfully shows:

1. That a judgment was therein rendered on October 7th, 1919, by this United States Circuit Court of Appeals for the Fourth Circuit, reversing a judgment of the District Court of the United States for the District of Maryland, rendered in said case on June 22nd, 1917, in favor of the plaintiff below, for \$2,139.00 and costs, amounting to \$558.00, and a counsel fee of \$1,250.00.

2. That the said case was brought at common law on Section 7 of the Act to protect trade and commerce against unlawful restraints and monopolies, approved July 2nd, 1890, and commonly known as the Sherman Act; and on Section 4 of the Act to supplement existing

laws against unlawful restraints and monopolies, and for other purposes, approved October 15th, 1914, commonly known as the Clayton Act.

3. That this is not a case in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; nor does the case arise under the patent laws, nor the trade-mark laws, nor the copyright laws, nor the revenue laws, nor the criminal laws, nor the bankruptcy laws, nor the employers' liability laws, nor the safety appliance laws, nor the hours of service laws, nor is it an admiralty case.

4. That it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error, inasmuch as the petitioner herein considers itself aggrieved by said judgment so rendered by this United States Circuit Court of Appeals for the Fourth Circuit, whereby the judgment of the District Court of the United States for the District of Maryland was reversed and the case remanded to said District Court with directions to enter a judgment for the plaintiff in error (defendant below) for costs.

Wherefore, your petitioner respectfully prays that a writ of error to the Supreme Court of the United States be allowed it in the above entitled case, in order that the errors complained of in the assignment of errors herewith filed by your petitioner, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States.

HORACE T. SMITH,

Attorneys for Frey & Son, Incorporated,
Defendant in Error.

ORDER ALLOWING WRIT OF ERROR.

Filed October 13, 1919.

Ordered, this 13th day of October, 1919, by the United States Circuit Court of Appeals for the Fourth Circuit, upon the foregoing petition, that a writ of error be, and it hereby, is allowed to have reviewed in the Supreme Court of the United States, the judgment of the

United States Circuit Court of Appeals for the Fourth Circuit entered in the above entitled case on October 7th, 1919; and that the amount of the supersedeas bond on said writ of error be, and it hereby is, fixed at \$1,500.00 and it is further

Ordered, That, upon the filing of an approved supersedeas bond, all further proceedings upon the part of the defendant below for the enforcement of said judgment be suspended and stayed until the final determination of the (567) Supreme Court of the United States upon the writ of error herein granted.

J. C. PRITCHARD,
U. S. Circuit Judge.

ASSIGNMENT OF ERRORS.

Filed October 13, 1919.

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 1571.

The Cudahy Packing Company, a corporation, Plaintiff
in Error,

vs.

Frey & Son, Incorporated, a corporation, Defendant in
Error.

And now comes Frey & Son, Incorporated, plaintiff below (defendant in error herein), and says that manifest errors have intervened to the injury of the plaintiff (defendant in error herein) in the rulings, decisions and opinions of this United States Circuit Court of Appeals

for the Fourth Circuit and in rendering its final judgment in said case on October 7th, 1919; and such errors of this Court consist especially:

1. In not affirming the judgment of the District Court, and in reversing said judgment and directing final judgment to be entered for the defendant below for costs.

2. In holding that there was no evidence in the case legally sufficient to entitle the plaintiff below (defendant in error) to recover.

3. In holding that the District Court should have directed a verdict for the defendant below (plaintiff in error).

4. In holding that the evidence did not tend to prove an unlawful combination to which defendant below was a party.

5. In holding that the evidence did not tend to prove (568) an unlawful discrimination to which defendant below was a party.

6. In not holding that the evidence did tend to prove an unlawful agreement or agreements to which defendant below was a party.

7. In holding that there was not such co-operation between seller and purchaser as amounted to a combination in restraint of trade within the rule laid down in *Dr. Miles Medical Company vs. Park & Sons Company*, 220 U. S. 373, and other following cases.

8. In holding that the defendant below merely exercised the right reserved by the Clayton Act to dealers of "selecting their own customers in *bona fide* transactions and not in restraint of trade", and that, therefore, the plaintiff below cannot recover under its charge of unlawful discrimination in price.

9. In holding that the decision of the Supreme Court of the United States in the case of *United States of America vs. Colgate & Company*, rendered June 2nd,

1919, was conclusive of this case, and denied the right of the plaintiff below to recover in this case.

Wherefore, Frey & Son, Incorporated, plaintiff below (defendant in error) prays that the judgment of the United States Circuit Court of Appeals for the Fourth Circuit, in said case, for the errors aforesaid, may be reversed by the Supreme Court of the United States.

CHAS. MARKELL,
HORACE T. SMITH,

Attorneys for Frey & Son, Incorporated,
Defendant in Error.

WRIT OF ERROR.

Issued October 13, 1919.

UNITED STATES OF AMERICA, ss:

The President of the United States To the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit,—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said (569) Circuit Court of Appeals before you, or some of you, between The Cudahy Packing Company, a corporation, Plaintiff in Error, and Frey & Son, Incorporated, a corporation, Defendant in Error, a manifest error hath happened, to the great damage of the said Defendant in Error as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States the 13th day of October, in the

year of our Lord one thousand nine hundred and nineteen.

(Seal of Court)

CLAUDE M. DEAN,

Clerk of the United States Circuit Court of Appeals
for the Fourth Circuit.

Allowed by

J. C. PRITCHARD,

Judge of the United States Circuit Court
of Appeals for the Fourth Circuit.

SERVICE OF WRIT OF ERROR.

The foregoing writ of error is served by lodging a copy thereof for the adverse party in the Clerk's Office of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, where the record remains, on the thirteenth day of October, 1919.

Attest:

CLAUDE M. DEAN,

Clerk U. S. Circuit Court of Appeals, Fourth Circuit.

WRIT OF ERROR BOND.

(570)

Filed October 16, 1919.

Know all Men by these Presents, That we, Frey & Son, Incorporated, a Corporation, as principal, and New Amsterdam Casualty Company, a Corporation, as surety, are held and firmly bound unto The Cudahy Packing Company, a Corporation, in the full and just sum of fifteen hundred dollars, to be paid to the said The Cudahy Packing Company, its certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 13th day of October, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a United States Circuit Court of Appeals for the Fourth Circuit, in a suit depending in said Court, between The Cudahy Packing Company, a Corporation, as Plaintiff in Error, and Frey & Son, Incorporated, a Corporation, as Defendant in Error, a judgment was rendered against the said Frey & Son, In-

corporated, and the said Frey & Son, Incorporated, having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said The Cudahy Packing Company, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof.

Now, the Condition of the Above Obligation is Such, That if the said Frey & Son, Incorporated, shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

FREY AND SON, INCORPORATED,
(Seal of Frey &
Son, Incorporated.)

WALTER A. FREY, Pres't,
HORACE T. SMITH, Asst. Secy.-Treas.
NEW AMSTERDAM CASUALTY CO.,

By SIG HUTZLER, Atty. in Fact.
(Seal of New Amsterdam
Casualty Co.)

Scaled and delivered
in presence of—

M. W. LANGLOTZ,
CHARLES RUZICKA,
T. W. CHELF.

Approved by—

J. C. PRITCHARD,
U. S. Circuit Judge.

CITATION.

(571) Issued October 13, 1919.

UNITED STATES OF AMERICA, ss:

To The Cudahy Packing Company, a corporation,—
Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Wash-

ington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States Circuit Court of Appeals for the Fourth Circuit, wherein Frey & Son, Incorporated, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable J. C. Pritchard, Judge of the United States Circuit Court of Appeals for the Fourth Circuit, this 13th day of October, in the year of our Lord one thousand nine hundred and nineteen.

J. C. PRITCHARD,

Judge of the United States Circuit Court of Appeals
for the Fourth Circuit.

SERVICE OF CITATION.

Service of a copy of within citation admitted October 15, 1919.

GILBERT H. MONTAGUE,

Atty. for The Cudahy Packing Company,
40 Wall Street,
New York.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA.
(572) Fourth Circuit. ss:

I, Claude M. Dean, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true transcript of the record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 8th day of November, A. D., 1919.

(Seal of Court)

CLAUDE M. DEAN,
U. S. Circuit Court of Appeals,
Fourth Circuit.

JAN 11 1921

JAMES D. MANER,
CLERK.

IN THE
Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 200.

FREY & SON, INCORPORATED, A CORPORATION,
Plaintiff in Error,

VS.

THE CUDAHY PACKING COMPANY, A CORPORATION,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

HORACE T. SMITH,
CHARLES MARKELL,
Counsel for Frey & Son, Inc.,
Plaintiff in Error.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1920.

No. 200.

FREY & SON, INCORPORATED, A CORPORATION,
Plaintiff in Error,

vs.

THE CUDAHY PACKING COMPANY, A CORPORATION,
Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action brought by the plaintiff in error (hereinafter called the plaintiff) against the defendant in error (hereinafter called the defendant) to recover triple damages under the Sherman Act. The unlawful "contract, combination * * * or conspiracy" complained of was one between the defendant, a manufacturer, and various jobbers for the maintenance of resale prices for defendant's article, known as "Old Dutch Cleanser." In the District Court (for the Dis-

trict of Maryland; the plaintiff had verdict and judgment for \$2,139; *i. e.*, three \$713. In the Circuit Court of Appeals this judgment for the plaintiff was reversed. From this judgment of reversal the plaintiff prosecutes this writ of error.

The Circuit Court of Appeals reversed the judgment for the plaintiff on account of the opinion of this Court in *United States ex. Colgate & Co.*, 250 U. S. 300, which had just been decided and had not yet been explained in the subsequent opinion of this Court in *United States ex. Schrader's Son, Inc.*, 252 U. S. 85. The Circuit Court of Appeals, at the same time it decided this case and on the same opinion, reversed on a second writ of error in another case, by the same plaintiff against another defendant (*Welch Grape Juice Co. ex. Frey & Son*, 261 Fed. 68), its own decision on a former writ of error in that same case, (*Frey & Son ex. Welch Grape Juice Co.*, 240 Fed. 111.) On the former writ of error in the *Welch* case the Circuit Court of Appeals held that the defendant in that case, a manufacturer, had "an understanding or agreement with the jobbers to whom it sold that they should sell at not less than a fixed price to retailers." On the second writ of error in the *Welch* case, presenting substantially the same evidence, and on the writ of error in the present case, the Circuit Court of Appeals reversed judgments for the plaintiff, in each case for the reason that "there was no formal written or oral agreement with jobbers for the maintenance of prices." The Court felt obliged by the opinion of this Court in *United States ex. Colgate & Co.*, 250 U. S. 300, thus to reverse itself.

In so reversing itself the Circuit Court of Appeals fell into substantially the same "misapprehension of the meaning and effect of the opinion and judgment in the *Colgate* case" which occurred in the lower Court in *Schrader's* case (250 U. S. 399). The error, in reversing judgments because there was "no formal written or oral agreement," though

there was "an understanding or agreement," is made manifest by the opinion of this Court in *Schrader's* case, which holds that the decision in *Colgate's* case is inapplicable when there is any resale price maintenance agreement, "whether express or implied from a course of dealing or other circumstances" (252 U. S. 99).

STATEMENT OF THE CASE.

The Circuit Court of Appeals reversed the judgment for the plaintiff on the ground that there was no evidence legally sufficient to prove an unlawful combination and that therefore a verdict should have been directed for the defendant (Record, pages 555-556). Notwithstanding this judgment of reversal and this decision of the Circuit Court of Appeals that the plaintiff was not entitled to recover, the plaintiff would have been entitled to a new trial (*Slacum vs. New York Life Insurance Co.*, 228 U. S. 364). Since, however, under the opinion and judgment of the Circuit Court of Appeals, such new trial could only have resulted in a directed verdict for the defendant, followed by a second writ of error to the Circuit Court of Appeals before a writ of error to this Court, the plaintiff, following the practice approved by this Court in *Thomsen vs. Cayser*, 243 U. S. 66, 82-83, filed a petition for rehearing, in which it expressly reserved its right of review by writ of error to this Court, but waived its right to a new trial in the District Court and consented to the entry of final judgment of reversal in the Circuit Court of Appeals without a new trial below (Record, pages 558-561). The Circuit Court of Appeals, also following the practice approved in *Thomsen vs. Cayser*, granted the petition for rehearing and entered final judgment of reversal without a new trial (Record, page 564). From this final judgment in the Circuit Court of Appeals, the plaintiff prosecutes its writ of error to this Court (Record, pages 565-567).

ASSIGNMENTS OF ERROR.

The assignments of error set up the action of the Circuit Court of Appeals in not affirming the judgment of the District Court, and in reversing that judgment and holding that there was no evidence legally sufficient to entitle the plaintiff to recover or to prove an unlawful combination or agreement, and in holding that this case was controlled by the decision in the *Colgate* case and not by the decision in the *Dr. Miles Medical Company* case (220 U. S. 373). (Record, pages 567-569.)

FACTS.

Until 1914 the plaintiff, a Baltimore jobber or wholesaler, had for several years bought Old Dutch Cleanser from the defendant, the manufacturer, at the defendant's established jobbers' or wholesalers' price, viz: \$2.95 a case, less 2% cash discount. In two instances, now unimportant, the plaintiff paid a slightly lower price. The goods thus bought by the plaintiff from the defendant were sold by the plaintiff to retailers. The defendant's established prices for sales to retailers ranged from \$3.20 to \$3.40 a case, according to the quantity sold, less a 2% cash discount which retailers seldom took advantage of. Prior to 1914 the plaintiff made most of its sales at the defendant's established prices. In some cases the plaintiff sold at less than the defendant's prices. The lowest price at which the plaintiff ever sold was \$3.15. The plaintiff's minimum profit on the sale of Old Dutch Cleanser was thus \$.20 a case [\$3.15 minus \$2.95], plus 2% discount [on \$2.95]; viz: \$.259 a case. On sales made at the defendant's prices, plaintiff's profit ranged upwards to \$.509, according to the quantity sold and to whether the retailer took the cash discount. Under these circumstances the plaintiff in three years, 1911, 1912 and 1913, bought and sold 6,653 cases of Old Dutch Cleanser, an average of 2,218 cases a year (Record, pages 85-87).

On February 3, 1914, the plaintiff ordered 250 cases of Old Dutch Cleanser from the defendant. On February 4, 1914, the defendant replied, quoting to the plaintiff only the established price on sales to retailers, viz.: \$3.20, less discount (Record, page 45). The price thus quoted by the defendant to the plaintiff, being \$.25 higher than its regular price to jobbers and being the highest price at which the plaintiff could resell the same goods in the same quantities, was prohibitive (Record, page 96). A few days later Mr. Frey, the president of the plaintiff corporation, was told by a representative of the defendant at the defendant's New York office that the defendant had refused to sell to the plaintiff at jobbers' prices because the plaintiff had cut prices in resales to retailers (Record, page 48). Prolonged correspondence between the plaintiff and the defendant ensued. The defendant, adhering to its position, refused to sell, and in fact did not sell, to the plaintiff at jobbers' prices after February 3, 1914. The plaintiff necessarily could not and would not buy at retailers' prices.

After the plaintiff was "cut off" in February, 1914, the plaintiff had continued demands, which it was unable to supply, for Old Dutch Cleanser (Record, pages 21-22, 280-282, 289). The plaintiff is engaged in the business of a general wholesale grocer. Its business in Old Dutch Cleanser constituted less than one-half of one per cent. of its total business. It could, therefore, have continued to do its business in Old Dutch Cleanser without any additional cost over and above what it cost to conduct its entire business after the defendant had "cut it off" (Record, pages 87-89).

On May 10, 1915, this suit was instituted under Section 7 of the Sherman Act (and Sections 2 and 4 of the Clayton Act) to recover three-fold the damages sustained by the plaintiff through the defendant's refusal to sell to the plaintiff at jobbers' prices, which refusal was alleged to be due to an unlawful agreement, between the defendant and jobbers to whom it sold, for the maintenance of resale prices on sales

by jobbers to retailers. On May 25, 1917, a verdict was rendered for the plaintiff for \$2,139 [*i. e.*, three times \$713] for the period to the date of suit, and for \$3,375 [*i. e.*, three times \$1,125] for the period from the date of suit to the date of the verdict (Record, pages 22, 26). On motion for a new trial and in arrest of judgment the Court set aside so much of the verdict as awarded damages after the institution of the suit. On the portion of the verdict covering the period prior to the institution of suit judgment was entered for \$2,139 and costs (Record, pages 23-26). Each of the two amounts found by the jury is equivalent to just about 8.25 a case on the quantity of Old Dutch Cleanser which the plaintiff might have sold, at the rate of 2,218 cases a year, during the respective period in question. The jury evidently allowed the plaintiff nothing whatever for any increase in business in Old Dutch Cleanser which might have been expected in 1914 (and 1915) as compared with 1911, 1912 and 1913, although the plaintiff's general business increased substantially in 1914 (and 1915). The jury likewise made no allowance for greater profits which the plaintiff would have made on sales at prices in excess of \$3.15, although the evidence indicates that most of the plaintiff's sales were made at such higher prices.

THE UNDERSTANDING OR AGREEMENT WITH JOBBERS FOR THE MAINTENANCE OF RESALE PRICES.

The evidence (admitted or excluded), together with objections, exceptions and colloquy of counsel, covers almost 400 pages of the Record (Record, pages 35-413). The Circuit Court of Appeals, however, finds "so little real conflict in the testimony on the vital issue," *i. e.*, whether the evidence was legally sufficient to prove an unlawful combination, "that, except on the measure of damages, the case might well have been tried without prejudice on the following as an agreed

statement of facts." The Court then states in one page the facts which it thus deems material and controlling but virtually undisputed (Record, pages 555-556). As this statement of facts by the Circuit Court of Appeals includes the finding that there was "no *formal* written or oral agreement with jobbers for the maintenance of prices," although on the first writ of error in the *Welch* case the Court had found "an understanding or agreement with the jobbers to whom it [the manufacturer] sold that they should sell at not less than a fixed price to retailers" (240 Fed. 116), it seems proper, if not necessary, to state more fully the evidence from which the Circuit Court of Appeals found that there was "an understanding or agreement" but not "a *formal* written or oral agreement" with jobbers for the maintenance of resale prices. Except on this vital point, further reference to the evidence beyond the statement of facts in the opinion of the Circuit Court of Appeals seems unnecessary. In short, the only evidence to be discussed is the evidence which the Circuit Court of Appeals held sufficient to show "an understanding or agreement," but insufficient to show a *formal* written or oral agreement. For the other facts of the case the opinion of the Circuit Court of Appeals is referred to.

Before quoting the statement of facts in this case by the Circuit Court of Appeals, a fuller statement of the action of that Court on the facts and on the law on the first writ of error in the *Welch* case may further narrow the issue in the present case by illustrating the extent to which, in the present case and on the second writ of error in the *Welch* case, the Circuit Court of Appeals felt constrained by what the plaintiff believes to have been a "misapprehension of the meaning and effect of the opinion and judgment" of this Court in the *Colgate* case.

On the first writ of error in the *Welch* case the Circuit Court of Appeals reversed a judgment for the defendant for

error in the admission of evidence. In its opinion on that writ of error the Circuit Court of Appeals said (italics ours):

"There was evidence tending to support these allegations of the declaration: *The defendant, a manufacturer and seller in Baltimore of an established article of commerce known as 'Welch Grape Juice' had an understanding or agreement with the jobbers to whom it sold that they should sell at not less than a fixed price to retailers * * **"

Frey & Son vs. Welch Grape Juice Co., 240 Fed. 114, 116.

Another trial in the *Welch* case (shortly after the trial in the present case) resulted in a verdict and judgment for the plaintiff. On a second writ of error the *Welch* case went again to the Circuit Court of Appeals. The present case and the *Welch* case were argued separately in the Circuit Court of Appeals. Before a decision in either case the Court of its own motion ordered both cases reargued. They were reargued together (*i. e.*, successively), and on July 16, 1919, were decided together, virtually on one opinion entitled in the *Cudahy* case.

The full opinion of the Circuit Court of Appeals in the *Welch* case on the last writ of error is as follows:

"In this action for damages under the federal statutes forbidding combinations and discriminations in restraint of trade, on the first trial the verdict was for the defendant. The judgment was reversed for error in the admission of testimony. 240 Fed. 114, 153 C. C. A. 150. The case is here again on a writ of error from a judgment on the second trial in favor of the plaintiff.

"The vital question on which all others turn is whether the testimony, viewed most favorably to plaintiff, tended to prove an unlawful combination or unlawful discrimination against the plaintiff to which defendant was a party. The facts differ in no essential particular from those in the case of *Cudahy Packing Co. vs. Frey & Son*, 261 Fed. 65,—C. C. A.—, decided

this day, and for the reasons stated in the opinion in that case the judgment must be reversed."

Welch Grape Juice Co. vs. Frey & Son, 261 Fed. 68.

On November 17, 1919, this Court denied a petition for a writ of certiorari in the *Welch* case (251 U. S. 551). There had been, however, in the Circuit Court of Appeals no final judgment of reversal without a new trial, as there has been in the present case. On June 1, 1920, this Court granted a writ of certiorari to the Circuit Court of Appeals for the Second Circuit [*Federal Trade Commission vs. Beech-Nut Packing Co.*, 253 U. S. 482] in the case of *Beech-Nut Packing Co. vs. Federal Trade Commission*, 264 Fed. 885, in which the facts are in some respects similar to the facts in the present case and the *Welch* case, and which was decided, before the decision of this Court in *Schrader's* case, on the same misapprehension of this Court's opinion in the *Colgate* case as occurred in the District Court in *Schrader's* case, and in the Circuit Court of Appeals in the present case and on the second writ of error in the *Welch* case. In the *Beech-Nut* case the Circuit Court of Appeals said (*italics ours*):

"Such a method, founded upon an agreement between a manufacturer and purchasers severally, was held to be a violation of the Sherman Act (Comp. St. §§ 8820-8823, 8827-8830) in *Dr. Miles Medical Co. vs. Park & Sons Co.*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. It is difficult to say why a different conclusion should be reached, if the same result is attained by acquiescence and cooperation *without express agreement* between the manufacturer and his purchasers severally. *Eastern States Retail Lumber Association vs. United States*, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915 A, 788. But we understand the Supreme Court to hold in *United States vs. Colgate & Co.*, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, that a similar, but less drastic, method of sale constitutes merely the exercise of a man's right to do what he will with his own, and is not obnoxious to the Sherman Act." (264 Fed. 889.)

This Court's opinion in *Schrader's* case shows the statements just quoted to be a *misunderstanding* of the limited scope of the review of the facts by this Court in the *Colgate* case and expressly holds that *without express agreement* an unlawful price maintenance agreement may be "implied from a course of dealing or other circumstances" (252 U. S. 99).

OPINION OF CIRCUIT COURT OF APPEALS.

The full opinion in the present case (above referred to in the opinion in the *Welch* case) is as follows (italics ours):

"In this action for damages under the federal statute forbidding combinations and discrimination in restraint of trade the District Judge refused to direct a verdict for the defendant and the plaintiff recovered judgment. Exceptions were taken at almost every step of the trial; but the vital question on which all others turn is whether the testimony, viewed most favorably to plaintiff, tended to prove an unlawful combination or unlawful discrimination to which the defendant was a party. There was a mass of testimony and a great number of objections to its introduction, and the case comes here on one hundred and forty-one assignments of error covering eighty-five pages of the record; but there was so little real conflict in the testimony on the vital issue that except on the measure of damages the case might well have been tried without prejudice on the following as an agreed statement of facts: The defendant manufactured and sold Old Dutch Cleanser and developed a large trade in that article by extensive advertisements in newspapers and magazines and by circulars and solicitors. Considering the maintenance of a fixed price necessary to an adequate profit, defendant adopted the following means of promoting sales and maintaining the wholesale price: It sold only to jobbers and wholesalers, who were expected to sell only to retailers. Soliciting agents were sent to retail merchants and orders taken from them at the list price to be transmitted to any jobber that the retailer named of the

jobbers to whom the defendant was selling. These jobbers selected by defendant though called distributing agents were purchasers to whom defendant sold at a fixed deduction or discount from the list price. The discount was intended as the jobber's profit. By circulars and personal interviews jobbers were insistently exhorted to maintain the fixed prices in their own interest and that of the defendant. The jobbers knew they were expected to maintain the prices fixed by the defendant and that they were liable to be cut off if they refused. There was occasional underselling by dealers and perhaps occasional disregard by the defendant of isolated acts of underselling. But the plan of the defendant was generally acquiesced in by jobbers, and its request or demands that the prices be maintained were generally complied with. There was *no formal* written or oral agreement with jobbers for the maintenance of prices.

"The plaintiff was a jobber on defendant's list of 'distributing agents' who had a considerable trade in Old Dutch Cleanser. Believing that by the elimination of certain expenses usually incident to the wholesale business, it could afford to sell Old Dutch Cleanser at less than the price enjoined by defendant, plaintiff reduced the price below that fixed by defendant. For that reason the defendant refused to sell plaintiff at its usual discount from the list price, thus cutting off its business by making it impossible for it to compete with other jobbers at a profit.

"The vital question is whether defendant's method of business coupled with the acquiescence of its customers therein by observing its requests or demands to maintain prices was such co-operation between seller and purchasers as amounted to a combination in restraint of trade within the rule laid down in *Dr. Miles Medical Company vs. Park & Sons Company*, 220 U. S. 373, and other following cases. We are obliged to hold that the question has been clearly answered in the negative by the Supreme Court in *United States of America vs. Colgate & Company*, decided June second, 1919. The court expressly held that the announcement in advance that customers were expected to charge

a price fixed by the seller and that the penalty for refusal to maintain prices would be refusal to sell to the offending customer, observance of the request to maintain prices by customers generally, and the actual enforcement of the penalty by refusal to sell to such customers as failed to maintain the price did not constitute a violation of the trust statute. Nothing more was done by the defendant and its customers in this case.

"Since the defendant, under the Colgate case, merely exercised the right reserved by the Clayton Act to dealers of 'selecting their own customers in *bona fide* transactions and not in restraint of trade,' the plaintiff cannot recover under its charge of unlawful discrimination in price.

"Reversed."

(Record, pages 555-556.)

Cudahy Packing Co. vs. Frey & Son, 261 Fed. 65.

There is no conflict between the Court's summary of the evidence on the first writ of error in the *Welch* case—"The defendant, a manufacturer, * * * had an understanding or agreement with the jobbers to whom it sold that they should not sell at less than a fixed price to retailers"—and the Court's summary in the present case,—"There was no formal written or oral agreement with jobbers for the maintenance of prices." There is, however, a complete reversal of opinion by the Court as to the necessity of a formal agreement to constitute an unlawful combination under the Sherman Act. Further examination of the evidence on this point will make this still more manifest.

CIRCULARS.

The very first evidence offered by the defendant in the present case was a circular issued by the defendant, dated April 6, 1914, designated O. D. C. 210, entitled "Distributing Agents' Compensation in the United States for Old Dutch

Cleanser and Other Products Listed Herein." On pages 2 and 3 of this circular the following statements, among others, are made under the caption "Distributing Agents and Their Compensation" (italics ours):

"For the most practical and economical merchandising and distribution to the trade, we appoint Distributing Agents, same being taken from business houses doing an exclusive jobbing trade."

"To insure the availability and success of their work and of our important and constant national advertising—as well as in the interest of the trade—*uniformity and equality as to terms, delivery and price is essential. It is, therefore, required of our Distributing Agents that they fully co-operate with us in this direction, as per terms, conditions and prices laid down in our published General Sales List.*"

"As remuneration to our Distributing Agents for their services in this work and for their investment, labor and risk in acting in our behalf in distributing these products to the trade, we allow the following—subject to withdrawal or change without prior notice:

"OLD DUTCH CLEANSER (18-10c. cans) 40c. per case off the Single Box Price."

"We especially desire to point out that this remuneration to our Distributing Agents may not be given away by them—wholly or in part—to any class of trade, either other jobbers, semi-jobbers, retailers or consumers."

"Application for place on our list of Distributing Agents will be considered by us at any time from jobbers in harmony with this policy." (Defendant's Exhibit "V." Record, page 307.)

"Distributing Agents" means simply "jobbers," as appears from the first and last paragraphs above quoted from this circular. In the defendant's previous circulars and trade literature jobbers had been called "jobbers." The testi-

mony, however, shows that the change was a change in name only and that with this change of name no change was made in the defendant's actual selling plan (Record, pages 278, 289, 324). The goods furnished by the defendant to its "Distributing Agents" were sold to such "Distributing Agents" and by them resold. Furthermore, the defendant's "Distributing Agents" in fact included all jobbers who cared to do business with the defendant, with the exception of the plaintiff and any other jobbers who would not agree to maintain resale prices—and of course any other jobber, if such there were, with whom the defendant for any special reason would not do business.

The defendant's circular O. D. C. 210, therefore, though issued two months after the plaintiff was "cut off," may be considered equally applicable to the relations between the defendant and jobbers before as well as after the plaintiff was "cut off." In fact the defendant's circulars issued before the plaintiff was "cut off," though different and in some respects not so pointed in verbiage, are substantially the same in purport and effect as the circular O. D. C. 210.

Indeed a circular O. D. C. No. 147, also offered in evidence by the defendant, dated April 14, 1913, indicates that the nominal change from "jobbers" to "Distributing Agents" had in fact been made before the plaintiff was "cut off." This circular, among other things, states (*italics ours*):

"In fairness to all of our retail customers, we consider that *uniformity of trading terms and prices are essential, and our distributing agents will co-operate with our own specialty sales force to this end.*" (Defendant's Exhibit "P.A." Record, page 195.)

A prior circular, O. D. C. No. 79, dated January 1, 1910, entitled "Jobbers' Cost," contains, among others, the following statements (*italics ours*):

"**OLD DUTCH CLEANSER and DUTCH HAND SOAP** will be sold at above prices to only such jobbers as strictly observe our published retail prices on all of

their resales, whether to their regular retail trade or to other jobbers and distributors.

"For retail selling prices in above territory see list No. 80."

NOTICE.

"Our business and especially the extension of the trade in these articles depends, mainly, upon their success in the market; and we, therefore, consider it essential to make every fair effort to assure to each merchant a steady and reasonable profit.

"Uniform and fair jobbing and retail prices and trading provisions accomplish this, and we further expect by such uniform sales promotion to gain a practical benefit in increased business to ourselves, to the jobber and the retail merchant, and to merit their united appreciation, good will and support.

"IN RELATION TO WHOLESALERS SUPPLY- ING ONE ANOTHER.

"IMPORTANT!

"It is the intent of our selling provisions governing distribution from jobbers' stock (or drop shipments from factory for account of jobber) that the prices provided for different quantity lots, are to govern without exception.

"If wholesalers should sell other wholesalers or distributors at an intermediate price between jobbers' cost and the fixed retail price, special prices might thereby gradually be extended to semi-jobbers to the ultimate restriction of our business.

"Any sales by jobbers at special prices could have no other effect than to enable the purchaser, whether jobber, large retailer or otherwise, to demoralize prices and disturb the entire business in these products.

"To prevent this it is therefore essential that we be the only ones to decide who is to buy at wholesale prices, and it is for that reason that jobbers' sales to other jobbers and distributors should be strictly at our published retail list—or, in other words, at the same price at which the jobber would sell to any retailer.

"This is a matter of so much importance that we deem it essential to bring it prominently to your notice by this means." (Plaintiff's Exhibit No. 26. Record, page 169.)

The circular O. D. C. No. 80, above referred to in O. D. C. No. 79, is likewise dated January 1, 1910, is entitled "Selling Price to Retailers—Old Dutch Cleanser," and contains, among others, practically the identical statements above quoted from O. D. C. No. 79. (Plaintiff's Exhibit No. 25. Record, page 167.)

The circular O. D. C. No. 111, also entitled "Selling Price to Retailers—Old Dutch Cleanser," is dated October 1, 1912, and is in all the respects material in this case, except as to date, identical with O. D. C. No. 80. (Plaintiff's Exhibit No. 24. Record, page 165.)

All of the above mentioned circulars were addressed to and circulated among jobbers or wholesalers generally. There was also offered in evidence a circular or letter entitled "Confidential Information as to our Old Dutch Cleanser Marketing Plan and Price Provisions," dated April 6, 1912, signed by the defendant, addressed "To our General Representatives," reading as follows (*italics ours*):

"O. D. C. PRICE LISTS contain full and exact particulars as to our price provisions, marketing plan and sales regulations.

"**JOBBER**s are those dealers whom we carry on our preferred list of customers, and it is *only to such that we sell at prices and under the conditions shown in our special Jobbers' Price List*. We recognize in this class only those wholesale distributors who have no retail affiliations.

"**VIOLATIONS**: Where a preferred (or jobbing) customer violates our marketing plan or price provisions it is our policy to discontinue him from our list of preferred customers.

"We put on each jobber's invoice a stamp reading as follows: 'On all your resales of the Old Dutch Cleanser covered by this invoice, to either retailer or jobber.

please observe our regular retailer's cost prices, in accordance with our published list.

"Our O. D. C. market plan, through jobbing medium rests on mutual confidence, respect and co-operation and we look to the principle in control of each jobbing house for the carrying out of our policy within its ranks.

"Our general representatives are requested to make our policy clear to our customers at every available opportunity, to ask their support and gain their appreciation for the following important reasons:

"'Old Dutch' is the original, the standard and the recognized seller in that line.

"It is continuously advertised on an important and (266) National scale. It is marketed through exclusive jobbing channels. To maintain a uniform price is the only way to insure the jobber a fair and reasonable profit, and we will spend our time and money freely in support of this policy.

"We canvass the retail trade through a large and well organized force of specialty salesmen.

"We treat our customers with uniform consideration, courtesy and equality, making no exception and extending no special favors to any class of trade or to any special territory.

"We ask of our general representatives a careful consideration of the above facts, feeling sure that their proper understanding and steady promotion of same will secure for us the good will and appreciation of the wholesale trade and its support in the sale and further distribution of Old Dutch Cleanser." (Plaintiff's Exhibit No. 28. Record, pages 214-215.)

A book of instructions from the defendant to its salesmen contains, among others, the following statements (italics ours):

"Maintenance of Price Schedule.

"It is our policy in marketing Old Dutch Cleanser and Dutch Hand Soap to wholesale grocers to maintain a uniform selling list (as published) to the trade. List shall be observed absolutely by all of our connections and by jobbers and distributors handling our goods, without exception.

"All jobbers of our Old Dutch Cleanser and Dutch Hand Soap have been properly notified form of which notice is shown on the other side of this sheet.

"It is needless for us to say that our sales connections must not cut price on these products, nor countenance price cutting on the part of jobbers or their salesmen, directly or indirectly, and any case of infringement of our limitations as to retail selling price should be promptly reported with all possible particulars as to date of order, date of shipment, name of merchant, location, number of boxes, etc.

"Our salesmen, so far as it comes within their province shall make it clear to jobbers and their salesmen that it is our purpose to carefully and effectively enforce our policy by all proper and legitimate means within our power."

"The following is form of notice issued:

"To jobbers:

"Old Dutch Cleanser and Dutch Hand Soap.

"We take this means of notifying you—as well as other jobbers—that it is our purpose to maintain a uniform selling basis from all jobbers to the trade (both retail and jobbing) in accordance with our published price list on Old Dutch Cleanser and Dutch Hand Soap, as per copies herewith.

"These goods, which bear our exclusive trademark, are widely and prominently advertised and known, which has established for them a certain fixed position and value.

"It is our purpose to admit only those jobbers who fully maintain these prices to the privilege of direct buying from us at full jobbers' discounts, and to such jobbers only will we give the benefit of the assistance of our specially selling force.

"Kindly arrange it so that your salesmen or employees will thoroughly understand these price limitations, and that no business, directly or indirectly, will be done in violation thereof.

"We want to emphasize the fact that the interchange of stock, or the sale of Old Dutch Cleanser by one jobber to another, must be at full retail list only.

"We expect by the enforcement of the above conclusions to gain a practical benefit in increased business, both to you and ourselves on these products, and hope to merit the support and appreciation of your company and other jobbing trade.

"Yours very truly,

"THE CUDAHY PACKING COMPANY,

"O. D. C. Department."

(Plaintiff's Exhibit No. 37. Record, pages 216-217.)

Stamped on a bill rendered by the defendant to the plaintiff, dated August 28, 1913, is the following notice:

"ALL your QUOTATIONS, BIDS, SALES and INVOICES for Old Dutch Cleanser either to jobbers, semi-jobbers, retailers or consumers, should be at a rate not lower than laid down in our published General Sales List." (Plaintiff's Exhibit No. 40. Record, page 319.)

Ever since August 28, 1913, such a notice, either in the form just quoted or in the form above quoted in Plaintiff's Exhibit No. 38, has been regularly stamped on bills (Record, page 408).

CORRESPONDENCE AND ORAL COMMUNICATIONS WITH INDIVIDUAL JOBBERS.

These circulars the defendant addressed to and distributed among the trade generally. Aside from the essentially contractual nature of some, at least, of these circulars, the defendant did not, however, in this way "merely indicate its wishes concerning prices and decline further dealings with all who failed to observe them" (252 U. S. 99). On the contrary, when jobbers broke the agreement to maintain resale prices which was made or confirmed by their acceptance of goods on the prices and terms set forth in the defendant's circulars, the defendant frequently entered into individual

personal communications with the defaulting jobber in order to re-establish the "understanding or agreement" which had thus been broken by the jobber. In written communications the word "contract," "agreement" and "understanding" were studiously avoided, sometimes with tedious circumlocution. The effect of these communications was, however, either in fact to establish or re-establish an "understanding or agreement" as to maintenance of resale prices or to end dealings with the jobber who would not enter into such an understanding or agreement.

On January 4, 1912, the defendant wrote a letter to Messrs. Frey & Thomas, jobbers at York, Pennsylvania (not connected with the plaintiff or related to Mr. Frey of the plaintiff corporation) enclosing "form of application for jobbing terms and declaration as to late business on Old Dutch Cleanser." In this letter the defendant also said (italics ours) :

"We would appreciate your carefully considering and filling out this form, if you find it available, returning one copy to us and retaining the other for your file.

"In sending you this form we wish to state that it is owing to our having had complaints about your sales of this item," (Plaintiff's Exhibit No. 29. Record, pages 183-184.)

The "form of application for jobbing terms and declaration as to late business on Old Dutch Cleanser" enclosed with this letter was a printed form of letter or declaration addressed to the defendant to be signed by a member of the offending firm of jobbers, Frey & Thomas, and was in substance a virtual "oath of allegiance" to the price maintenance plan of the defendant and the jobbers with whom the defendant dealt. In this form the jobbers, among other things, say (italics ours) :

"We * * * understand that *while you require no agreement from any customer respecting the retail price and terms at which he will sell, you nevertheless main-*

tain a special price for such jobbers as co-operate with you in the distribution of your products."

The member of the firm signing the form states:

"That I am (and the management of said firm are) thoroughly familiar with the terms and selling prices of Old Dutch Cleanser.

"That I understand the selling prices and terms to be as per list attached hereto, and that I (or my firm) have given positive instructions to every salesman to adhere absolutely to these prices and terms, and to the office staff as it may affect the settlement of accounts.

"That I am fully aware of the fact that it is contrary to your selling plan to sell at less than the prices as per price list attached hereto or on any better terms than the terms mentioned in the price list hereto attached, to any one, either wholesaler or retailer, as the case may be, by agents or otherwise, or to allow or promise to allow a discount or commission of any kind, directly or indirectly, on sales of Old Dutch Cleanser.

"That for a period of at least six months preceding the date hereof I have not nor has my firm sold in the City of York, Pa., or elsewhere to any one, or permitted to be sold to any buyers, either wholesaler or retailer, respectively, Old Dutch Cleanser, at less than the prices above mentioned, or on better terms or discounts provided in said lists, and have not allowed or agreed to allow any other discount or commission, or allowance of any kind, directly or indirectly.

"That I did not give, or offer to give, or promise to give or intimate, nor has my firm, that at any future time there might or would be given to any person for or on his behalf, any rebate, refund, reduction, discount (except as above), freight allowance, credit note or other consideration of value not authorized by the price list."

Then follow three more paragraphs negating various other devices which might be resorted to in order to conceal a cut in prices. (Plaintiff's Exhibit No. 29-A. Record, pages 184-186.)

Frey & Thomas would not sign this "form of application" and in consequence were "cut off" (Record, page 186). Further correspondence, however, ensued.

In a letter to Frey & Thomas, dated January 9, 1912, the defendant, among other things, said (*italics ours*):

"We are very sorry at the position indicated in your letter.

"We enclose price list, and call your attention to the *regulations which*, according to your letter, *you have not been observing*.

"We make it a rule to retain on our preferred list of customers, to whom only *we sell at jobbing prices, those who practically and fully co-operate in our marketing plan.*" (Plaintiff's Exhibit No. 30. Record, page 188.)

Again, on March 1, 1912, in a letter to Frey & Thomas, the defendant said:

"Our interests are altogether to recognize every legitimate jobber who fairly co-operates with our marketing plan." (Plaintiff's Exhibit No. 31. Record, page 190.)

On October 14, 1913, the defendant wrote to Frey & Thomas as follows (*italics ours*):

"Our Pittsburg office has sent us your letter of October 11th.

"We are writing our Division Manager, Mr. A. P. Harbison, in Pittsburgh, to make it convenient to look you up at the first possible opportunity.

"Meanwhile, we are unable to add anything to our last advices.

"We will be glad if the forthcoming interview with Mr. Harbison will enable us to again place your name on our list of Distributing Agents for Old Dutch Cleanser, which position demands your practical and careful co-operation with our business policy in the increased distribution and further introduction of Old Dutch Cleanser products." (Plaintiff's Exhibit No. 33. Record, pages 200-201.)

Mr. Harbison's trip to York and his interview with Frey & Thomas did not result in the desired understanding and the defendant accordingly refused to deal with Frey & Thomas. On February 2, 1914, the defendant wrote to Frey & Thomas, saying:

"Mr. Harbison recently made a trip to York and called on you.

"The conclusions which he then conveyed will have to govern us." (Plaintiff's Exhibit No. 35. Record, pages 202-203.)

"Interviews" between the defendant's representatives and jobbers were not, however, generally, like Mr. Harbison's interview with Frey & Thomas, fruitless. Lawrence Sonnehill, a former employee of the defendant, referring to visits to jobbers and interviews concerning price maintenance by representatives of the defendant known as "division men," testifies (*italics ours*):

"I have heard Mr. Lorton, a division man from Philadelphia, of the Cudahy Packing Company, I have heard him tell the jobber very often in my presence that it was necessary to maintain prices, that the field could not be kept in a healthy condition unless the price was maintained. * * * *The jobber in these conversations would answer along the lines that he appreciated that in order to get a profit out of it that he would maintain the prices, that there was no question on that score at all.*" (Record, page 228.)

The only witness called by the defendant in this case (except one of its Department Managers at Chicago, whose deposition was excluded by the District Court for reasons hereafter mentioned) were five Baltimore jobbers, Edgerton, Schwab, Drury, Snow and Baughart, who testified that they had no "contract" or "agreement" with the defendant to maintain resale prices (Record, pages 310, 314, 321, 324, 326). All five, however, testify to their acquaintance with the defendant's circulars (Record, pages 309, 317, 321, 324,

325), and all in fact maintained prices, except Schwab in a few, apparently clandestine, cases (Record, pages 313, 314-315, 317, 322, 325-326, 327).

Mr. Edgerton, moreover, immediately after testifying that he "never had any contract" with the defendant in respect of the price at which he should resell Old Dutch Cleanser, further testified as follows (italics ours):

"Q. Do you or do you not, or did you or did you not in 1914, '15 and '16 feel free to sell Old Dutch Cleanser at any price you wished?

"A. Well, now *I do not know whether we feel free to sell that class of goods at any price we wish.* We handle a large number of similar goods that are billed to us at the factory's price, and *we are supposed to sell at the resale price understood or established by the factory.*

"(The Court): You know that they expect you to sell at the resale price?

"(The Witness): Why, all manufactured goods of that sort, we are supposed to sell at the resale price. I do not think we have got any contract on any of those goods.

"(The Court): Do you feel that you are under a moral obligation?

"(The Witness): Well, yes, *we feel that we are under a moral obligation.*" (Record, pages 310-311.)

Mr. Edgerton also testified that he "should think that other jobbers would have a perfect right to complain to the manufacturer" if he cut the price of Old Dutch Cleanser (Record, page 313).

Mr. Schwab also, after testifying that he "never had any agreement of any kind" and felt free to sell the goods at any price he wanted (Record, page 314), testified on cross-examination:

"Q. And do you not feel under any obligation, then, at all to observe the prices fixed by the Cudahy Packing Company?

"A. Yes, we do feel a little obligation to them.

"Q. Just tell us how little, or how much of an obligation you feel in that matter?

"A. Because they do a great deal of missionary work, and they try to protect the jobber in that way by giving him a legitimate profit, and for that reason we think we should keep as near the price they give us as we can.

"Q. Do you feel under any obligation to keep it at that price?

"A. I feel that I am under obligation to keep as near the price as I can." (Record, page 315.)

Likewise Mr. Drury, after testifying that he "did not have any agreement of any kind" and felt free to sell Old Dutch Cleanser at any price he wished (Record, page 321), later testified:

"(The Court): Would you feel that you were dealing perfectly fairly with the Cudahy Packing Company and the other jobbers in town, if, in point of fact, you did sell at, say \$3.30?

"(The Witness): No, I would not think it would be fair to anybody, certainly not fair to ourselves, and it would not be fair to the manufacturers or my competitors. * * *

"Q. And you sell at the price they fix?

"A. Yes.

"Q. And you consider yourself morally bound to do that?

"A. Oh, I do not know about that. Yes, I think it is the only fair way." (Record, pages 322, 323.)

Another Baltimore jobber, Mr. Reiter, called as a witness by the plaintiff, testified on cross-examination that he regarded himself as absolutely free to sell Old Dutch Cleanser at any price he chose (Record, page 286), but afterwards testified as follows (*italics ours*):

"There has never been any contract entered into between us and the Cudahy Packing Company as to the price at which we should sell Old Dutch Cleanser nor any agreement of any kind at all as to price, any agree-

ment by which we obligated ourselves that we would sell at a certain price.

"(The Court): *Did you feel yourself, after your conversation with the agent, in honor free to cut the price?*

"(The Witness): *Not honor free, no, sir.*

"Q. What do you mean by that?

"A. *I mean that I practically assured him that it was beyond my knowledge that they had any such policy and that if I had known it I would have been only too glad to have co-operated with them as I have done with all manufacturers, and that I would see that with my knowledge it would not be done.* Because I considered it fair to ourselves and to the Cudahy Company and distributing agents everywhere to sell at the price, that is why we sold it at that price. That states the whole of our understanding.

"RE-DIRECT EXAMINATION.

"Q. (By Mr. Smith): *Then you did agree with the representative of the Cudahy Packing Company who called to see you at the time mentioned not to cut the price in selling Old Dutch Cleanser?*

"A. *Only verbally.*" (Record, page 288.)

ARGUMENT.

I.

- (A) AGREEMENTS—WHETHER FORMAL OR INFORMAL, EXPRESS OR IMPLIED—BETWEEN A MANUFACTURER AND DEALERS FOR THE MAINTENANCE OF RESALE PRICES ARE UNLAWFUL.
- (B) THE EVIDENCE IS LEGALLY SUFFICIENT TO SHOW SUCH AGREEMENTS.

A.

The unlawfulness of agreements between a manufacturer and dealers for the maintenance of resale prices is established by repeated decisions of this Court.

Dr. Miles Medical Co. vs. Park & Sons Co., 220 U. S. 373;

Bauer vs. O'Donnell, 229 U. S. 1;

Straus vs. Victor Talking Machine Co., 243 U. S. 490;

Motion Picture Patents Co. vs. Universal Film Co., 243 U. S. 503;

Boston Store vs. American Graphophone Co., 246 U. S. 8;

United States vs. Schrader's Son, Inc., 252 U. S. 85.

On the first writ of error in the *Welch* case, the Circuit Court of Appeals properly held that all such price maintenance agreements are unlawful, regardless of the supposed economic good or evil to result in a particular case. Such indeed was the decision of this Court in the *Dr. Miles Medical Co.* case, holding price maintenance agreements to be not merely restraints of trade, but *unreasonable restraints of trade* (*Dr. Miles Medical Co. vs. Park & Sons Co.*, 220 U. S. 373, 406-408). Possible doubt on this score was, however, removed by the decision in the *Boston Store* case, where the alleged reasonableness of price maintenance agreements and the alleged economic benefits resulting therefrom were fully urged, but were rejected on a review of the previous cases.

The opinion in *United States vs. Colgate & Co.*, 250 U. S. 300, gives no countenance to the arguments which were thus conclusively rejected in the *Boston Store* case. The *Colgate* case decided no new question of substantive law. Certainly it did not decide that a *formal* agreement is neces-

sary to constitute an unlawful combination under the Sherman Act. Confessedly no *formal* agreement was either alleged in the indictment or found in the indictment by the lower Court. If, therefore, this were a criterion, this Court could have had no "serious doubts" (250 U. S. 306) about the construction of the lower Court's opinion.

Nevertheless, the opinion of this Court in the *Colgate* case has been seriously misconstrued by lower courts, not only in the case now at bar, but in other cases. As a result of such misconstruction by the lower Court in *Schrader's* case, the whole question involved, and decided by this Court, in the line of cases from the *Dr. Miles Medical Company* case down to the *Boston Store* case was reargued in this Court in *Schrader's* case. This Court in *Schrader's* case did not deem it necessary again to review the question either on principle or on authority, but did definitely point out the misconstruction of its opinion in the *Colgate* case, restate the scope of that opinion, distinguish it from the earlier cases and reaffirm the doctrine of the *Dr. Miles Medical Co.* case. This review by this Court of its own previous opinions make any further discussion of the scope of the *Colgate* case superfluous (italics ours):

"The Court below misapprehended the meaning and effect of the opinion and judgment in that cause. We had no intention to overrule or modify the doctrine of *Dr. Miles Medical Co. vs. Park & Sons Co.*, where the effort was to destroy the dealers' independent discretion through restrictive agreements. Under the interpretation adopted by the trial Court and necessarily accepted by us, the indictment failed to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated 'as alleging only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.'

"It seems unnecessary to dwell upon the obvious difference between the situation presented when a manu-

facturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into *agreements—whether express or implied from a course of dealing or other circumstances*—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States."

United States vs. Schrader's Son, Inc., 252 U. S. 85, 99-100.

B.

The Circuit Court of Appeals finds that the facts in this case "differ in no essential particular" from those in the *Welch* case. In the *Welch* case on the first writ of error the Circuit Court of Appeals found evidence of "an understanding or agreement" by the defendant with jobbers for the maintenance of resale prices. In the present case the Circuit Court of Appeals finds "no formal written or oral agreement with jobbers for the maintenance of prices." The reversal by the Circuit Court of Appeals in this case of its former decision in the *Welch* case is thus not due to any difference between the facts in this case and on the second writ of error in the *Welch* case and the facts on the first writ of error in the *Welch* case. It is due solely to the reversal of opinion by the Circuit Court of Appeals (through its misconstruction of the opinion of this Court in the *Colgate* case) as to what facts are material. On the first writ of error in the *Welch* case, the fact deemed material by the Circuit Court of Appeals was the existence of an "understanding or agree-

ment" with jollers for the maintenance of prices. In the present case and on the second writ of error in the *Welch* case, the fact deemed material by the Circuit Court of Appeals was the absence of a "formal written or oral agreement."

In this respect the opinion of the Circuit Court of Appeals on the first writ of error in the *Welch* case is in accord with the doctrine of the *Dr. Miles Medical Company* case and with the last opinion of this Court on this subject in *Schrader's case*. The opinion of the Circuit Court of Appeals in the present case, and on the second writ of error in the *Welch* case, is due to a misconstruction of the opinion of this Court in the *Colgate* case and is not in accord with the doctrine of the *Dr. Miles Medical Company* case or with the opinion of this Court in *Schrader's case*. Since the Circuit Court of Appeals and the District Court thus concur in finding evidence legally sufficient to show an agreement or understanding between the defendant and dealers to maintain resale prices, extended discussion of this evidence in this Court will perhaps be superfluous. This evidence has, however, already been summarized herein at some length. The evidence thus summarized strikingly illustrates "the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices" (252 U. S. 39). This difference—between the exercise by a manufacturer of "his independent discretion concerning his customers" and a combination "through agreements designed to take away dealers' control of their own affairs"—and the essentially *mutual* character of the combination between the defendant and dealers for the maintenance of resale prices are illustrated in the evidence with reference to (a) the "circulars and personal inter-

views by which jobbers were insistently exhorted to maintain the prices fixed by the defendant" (Record, page 555); (b) the action taken by the defendant, and (c) that taken by other jobbers, members of the combination, upon failure of a jobber to maintain resale prices.

(a) Except that the resulting contract is in its nature *unlawful*, the distribution by the defendant among jobbers of its circulars stating the terms on which it would sell to jobbers at jobbers' prices, followed by the delivery of goods and by payment therefor at the prices stated in the circulars, comprises all the elements of a *legal contract* on the part of such jobbers with the defendant to observe the terms of the circulars, including the maintenance of resale prices. The title of the defendant's circular O. D. C. 210 [*supra*, pages 12-13] was "Distributing Agents' Compensation." The subject of the circular was the maintenance of resale prices, discussed at length and with emphasis both in black and in red ink. In this circular the defendant did not "merely indicate its wishes concerning prices," but definitely stated what it *contracted and paid for*. "It is * * * required of our Distributing Agents that they fully co-operate with us in this direction, as per terms, conditions and prices laid down in our published General Sales List. * * * As remuneration to our Distributing Agents for their services in this work," specific discounts are allowed off the defendant's General Sales List prices. "This remuneration to our Distributing Agents may not be given away by them."

Whenever a jobber received goods from the defendant and paid for them at the defendant's jobbers' prices, *i. e.*, at the General Sales List price, less the jobbers' discount, such jobber thereby not only *contracted* to maintain resale prices pursuant to the terms of the circular, but actually *received in advance payment* of "remuneration" for such maintenance of resale prices. The maintenance of resale prices was an essential part of the consideration—if not the only considera-

tion—for the reduced price paid, or “remuneration” received, by the jobbers.

So in the defendant’s prior circulars O. D. C. Nos. 111, 89 and 79 [*supra*, pp. 14-16] the statements that “Old Dutch Cleanser * * * will be sold at jobbers’ prices to only such jobbers as strictly observe the retail selling prices in this list on all of their resales” and that “it is the intent of our selling provisions governing distribution from jobbers’ stock * * * that the prices provided * * * are to govern without exception,” and the statement in O. D. C. 147 [*supra*, page 14] that “our distributing agents will co-operate with our own special sales force to this end” were manifestly not “mere indications of wishes concerning prices” in future sales by jobbers, but were definite statements of the terms of the contracts made between the defendant and jobbers whenever the defendant sold to jobbers.

In *Giard vs. Harris*, 117 Mass. 72, 73-74, the Court, in its opinion by CHIEF JUSTICE HOLMES, said:

“This is an action of contract to recover \$21 as liquidated damages for breach of an agreement not to sell Phenyl Caffein below a stipulated price. Phenyl Caffein was a proprietary medicine purchased by the defendant of the plaintiff. At the time of the sale and as a part of it a written statement of terms containing the agreement was read to the defendant and delivered to him. One stipulation expressed in the document was that the acceptance of the goods with the notice of the conditions of the sale should be an assent to the terms. The defendant accepted the goods and expressed no dissent. There is no question, therefore, that he agreed to those terms upon the consideration of the sale, which was made with a deduction from the full retail price. This defendant sold the goods so purchased below the stipulated price and broke his contract. So much of the defendant’s argument as denies the agreement, the consideration, or the applicability of the contract to the goods sold needs no further discussion.”

In the present case the defendant's circulars are the complete, though circumlocutory, equivalent of the written statement of terms in *Garst vs. Harris*. In the *Dr. Miles Medical Co.* case the majority of this Court refused to follow *Garst vs. Harris* as to the legality of the contract in question. Nothing in the opinion in the *Dr. Miles Medical Company* case or any of the subsequent opinions of this Court, however, suggests any dissent from the opinion in *Garst vs. Harris* as to the evidence of the contract.

So in *Henry vs. Dick Co.*, 224 U. S. 1, 14, this Court held that the sale and delivery of an article with a "license restriction" attached to it constitutes a contract on the part of the purchaser to observe the license restriction. *Henry vs. Dick Co.* has, of course, been overruled on the question of the legality of such a contract or the enforceability of such a license restriction under the patent laws. This Court, however, has never intimated any doubt as to its ruling that such a sale and delivery of personal property, together with a statement of the terms of the contract of sale, constitutes a contract to observe the terms so stated.

In *Parker vs. South Eastern Railway Company*, L. R. 2 C. P. D. 416, 421, LORD JUSTICE MELLISH thus stated the law:

"Now if in the course of making a contract one party delivers to another a paper containing writing, and the party receiving the paper knows that the paper contains conditions which the party delivering it intends to constitute the contract, I have no doubt that the party receiving the paper does, by receiving and keeping it, assent to the conditions contained in it, although he does not read them, and does not know what they are."

The greater number of reported cases have to do with railroad or steamship tickets, baggage or parcel checks or receipts, or similar documents issued by common carriers, telegraph companies or the like. The principle, however, is equally applicable, and more readily applied, to dealings at arms' length between parties who are under no legal obliga-

tion, apart from contract, to deal with each other at all. In such cases the inference is more unequivocal that the receipt by one party from the other, at or before the consummation of a transaction, of a statement of the terms of the transaction, amounts to assent to such terms by the party receiving the statement and effects a contract on such terms between the two parties.

In *Dent vs. North American Steamship Co.*, 49 N. Y. 390, 394-395, the decision of the Court (as stated in the syllabus) was that "where, after the receipt of a written statement of the terms of sale of personal property, the vendee takes possession of the property without any dissent, this constitutes an acceptance of and acquiescence in the terms, and the statement becomes the contract of sale."

In *Watkins vs. Rymill*, L. R. 10 Q. B. D. 178, the defendant was engaged in the business of selling wagons and vehicles on commission. The plaintiff left with the defendant a wagonette, for which he was given a receipt stating that the article in question was received "subject to the conditions as exhibited on the premises." One of the conditions of which notice was posted on the premises was that the defendant reserved the right, after a certain time, to sell at auction articles left with him, in order to pay charges on them. It was held that the plaintiff was bound by such conditions whether he actually read them or not. In summarizing the law the Court said:

"A great number of contracts are in the present state of society made by the delivery by one of the contracting parties to the other of a document in a common form, stating the terms by which the person delivering it will enter into the proposed contract. Such a form constitutes the offer of the party who tenders it. If the form is accepted without objection by the person to whom it is tendered this person is as a general rule bound by its contents, and his act amounts to an acceptance of the offer made to him, whether he reads the document or otherwise informs himself of its contents or not."

L. R. 10 Q. B. D. 183.

In the common carrier cases and many other cases, the question is much discussed whether the party delivering the statement of terms sufficiently brings such statement to the notice of the other party. In the present case this question does not arise, for the reason (1) that the uncontradicted evidence is that jobbers generally received and accepted the defendant's circulars, and (2) that whenever any jobber violated the terms of the circulars, and apparently even when no such violation occurred or was threatened, the circulars were followed up by personal "interviews" between the defendant's representatives and jobbers.

(b) The *mutual* character of the *combination* between the defendant and jobbers is still further illustrated by what the defendant *did* when a jobber failed to maintain prices. Instead of "refusing to deal with anyone who *failed* to maintain resale prices specified by it," (*Cf.* 250 U. S. 306), the defendant, when a jobber first failed to maintain prices, *did not refuse* to deal with such jobber, but *did* by written communications and by personal interviews try to *effect an understanding that such jobber would maintain prices*.

In the case of the jobbers Frey and Thomas, of York, Pennsylvania [*supra*, pages 20-23], both written communications and a personal interview were tried, though without the desired result. The printed form of "oath of allegiance," called "application for jobbing terms," is, in spite of its formal recital that the defendant "requires no agreement," nevertheless *in fact* a sweeping *agreement to maintain prices*. The legal consequences of making an unlawful agreement cannot be evaded by the simple device of reciting in the agreement itself that it is *not* an agreement or by the substitution of the past or the perfect for the future tense. The defendant had no mere historic interest in the past business methods of its customers. It had no interest whatever in what any of these customers "had done" or "did do" in the past, except

in so far as such customers gave promise to continue so to do in the future. The purpose, and the only purpose, of this "oath of allegiance" was to state with unmistakable clearness the *understanding*, between the defendant and the customer signing the paper, that such customer not merely had maintained but *would maintain* prices.

Indeed, the further correspondence between the defendant and Frey and Thomas illustrates that what a customer *had done* was wholly immaterial, and that the only essential was an *understanding between the defendant and the customer* as to what the customer *would do* in the future. After they had been "cut off" for more than six months, Frey and Thomas could, with literal truth at least, have signed statements that they *had not* for at least six months cut prices. What they could not and would not sign was agreements, both express and implied, that they *would not* cut prices in the future. More than eighteen months after Frey and Thomas were "cut off," the defendant wrote them that it would be glad if "the forthcoming interview" with a representative of the defendant would enable the defendant to again place their name on its "list of Distributing Agents * * *," which position demands your practical and careful co-operation" with its business policy in the distribution of Old Dutch Cleanser (Record, page 201). Obviously the only purpose of "the forthcoming interview" was to effect an *understanding* that Frey and Thomas would "co-operate" by maintaining prices. The interview was had, but the understanding was not effected. The evidence, however, shows that in this respect the methods pursued were usual, but the result was exceptional.

From the fact that the defendant sent out printed forms of its "oath of allegiance" it may be inferred that other customers did, though Frey and Thomas did not, sign this form when requested so to do. With respect to personal interviews, it affirmatively appears that very often in such interviews

jobbers, answering the defendant's representatives, would say that they "would maintain the prices" fixed by the defendant (Record, page 228).

This written "oath of allegiance" and these personal interviews merely reiterated the *understanding and agreement* already existing between the defendant and jobbers, effected by the distribution of the defendant's circulars and the subsequent sale and delivery of goods to jobbers on the terms stated in the circulars.

(c) Even when the defendant ultimately did stop selling to a jobber who cut prices, it did so, not in the "exercise of its own independent discretion" as to parties with whom it would deal" (250 U. S. 307), but at the instance of other jobbers who were parties to this price maintenance combination for *their own mutual benefit* and as such were *interested* in having the defendant stop selling to a jobber who cut prices. The defendant's letter of January 4, 1912, to Frey and Thomas, of York, Pennsylvania, enclosing printed form for signature, expressly states that the sending of this form is "owing to our having had complaints about your sales of this item" (Record, page 184) [*supra*, page 20]. Mr. Edgerton, one of the witnesses called by the defendant to testify that he had no "contract" with the defendant to maintain prices, nevertheless says, "I should think that other jobbers would have a perfect right to complain to the manufacturer if we did cut the price" (Record, page 313). Mr. Edgerton had already testified that he felt that he was under a moral obligation to maintain resale prices (Record, page 311).

If, as the plaintiff maintains to be the fact, the distribution of the defendant's circulars to jobbers, followed by the sale and delivery of goods on the terms of the circulars, effected agreements or understandings with such jobbers to observe the price maintenance provisions of the circulars, then it matters not whether such jobbers called such under-

standings "contracts" or "agreements." It is, however, significant that, of the five jobbers called by the defendant to testify that they had no "contracts" or "agreements" to maintain prices, two admitted that they felt under a moral obligation to maintain prices, all except one in fact had maintained prices, and that one felt under obligation to "keep as near the price as he could" and seldom, apparently never openly, failed to maintain prices. None of the other four, therefore, had had any occasion, and the fifth had had little occasion, to consider whether, consistently with their obligations to the defendant, they might cut prices, or to have their understanding with the defendant further elucidated through personal interviews with the defendant's representatives. All five in fact were acquainted with the defendant's circulars and, whatever their inner mental states, never, by word or act, expressed dissent from any of the terms thereof.

No authority can be found, in the *Colgate* case or in any decision of this Court, requiring a formal agreement to constitute an unlawful combination under the Sherman Act. On the contrary, in the *Tobacco* case this Court said, referring to its decision in the *Standard Oil* case, that—

"as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the first and second sections of the law, when taken together, embraced *every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed*. That is to say, it was held that in view of the general language of the statute and the public policy which it manifested, there was *no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape by any indirection the prohibitions of the statute.*" (Italics ours.)

United States vs. American Tobacco Co., 221 U. S. 106, 181.

This comprehensive construction of the Sherman Act by this Court justifies the language of the District Court, in the consideration of the so-called Gary dinners, in the *United States Steel Corporation* case. The District Court's disposition of this branch of the *United States Steel Corporation* case seems to have been deemed satisfactory by both the majority and the minority of this Court (*United States ex. V. S. Steel Corporation*, 251 U. S. 417, 445, 460).

"This country has always been committed to the principle of fair and real competition in business—the struggle between individuals to sell goods in a market free from artificial control or influence—and the Sherman Act merely repeats this principle when it condemns, in the first section, 'every contract or combination in restraint of trade.' When, therefore, individuals or corporations make distinct contracts with each other, either in the form of pools or other agreements, dividing territory, limiting output, or fixing prices, there can be no question about the illegality of such contracts. And it makes no difference whether or not the agreement attempts to fix a penalty for its breach. The essence of the offense is that agreement; the penalty is merely an incident; so that a so-called 'gentlemen's agreement' to divide territory, etc., is quite as illegal as a formal pool with a formal penalty. In a gentlemen's agreement the sanction is the sense of honor, the moral obligation, the indefinite, but real, force that in some instances compel persons to keep their promises simply because they have promised.

"But suppose what happens is this: A number of persons take no action about territory or output, their discussions being mainly concerned with the subject of price, and suppose, further, that they refrain from making a definite formal agreement, and limit themselves to an understanding, a declaration of purpose—an announcement of intention—what, then, is to be said? Have they offended against the law? This question cannot be answered until we know what the participants were really doing. It is not enough to rest upon the varying names that may be given to the transaction. It is of the utmost importance to know how these names

are to be interpreted and this is the crucial matter to be looked for in the present record. * * *

"Now to our minds the testimony taken as a whole makes the conclusion inevitable that the result of these meetings was an understanding about prices that was equivalent to an agreement. We have no doubt that among those present some silently dissented and went away intending to do what they pleased; but many, probably most, of the participants, understood and assented to the view that they were under some kind of an obligation to adhere to the prices that had been announced or declared as the general sense of the meeting. Certainly there was no positive and expressed obligation; no formal words of contract were used; but most of those who took part in these meetings went away knowing that prices had been named and feeling bound to maintain them until they saw good reason to do otherwise, and feeling bound to maintain them even then until they had signified to their associates their intention to make a change. We cannot doubt that such an arrangement or understanding or moral obligation—whatever name may be the most appropriate—amounts to a combination or common action forbidden by law. The final test, we think, is the object and the effect of the arrangement, and both the object and effect were to maintain prices, at least to a considerable degree."

United States vs. United States Steel Corporation, 223 Fed. 55, 155, 160-161.

In the evidence in the present case, covering almost 400 pages of the Record, there is, as the Circuit Court of Appeals in effect observed, practically no contradiction on any material point. The District Court on the uncontradicted evidence might well have directed the jury to find an agreement or combination in violation of the Sherman Act. The District Court, however, gave no such peremptory instruction, but, in a fair, comprehensive charge, left it to the jury to find, as a question of fact, whether or not there had been such an unlawful agreement or combination. On this question the jury found for the plaintiff. The Circuit Court of

Appeals, misapprehending the opinion of this Court in the *Colgate* case, held that there was no evidence to support a finding by the jury of such a *formal* agreement as the Circuit Court of Appeals deemed necessary, under the *Colgate* case, to constitute a violation of the Sherman Act. In so holding the Circuit Court of Appeals did not apparently take a different view of the evidence from that taken by the District Court or that now presented by the plaintiff. The error by the Circuit Court of Appeals of which the plaintiff complains is, not its view of what the evidence really shows, but its mistaken view of what the evidence must show to establish a violation of the Sherman Act. The evidence in this case, the plaintiff claims, is sufficient to have warranted a peremptory instruction to find an unlawful agreement or combination, and is at least ample to support the finding of such an agreement as a fact by the jury.

Such an agreement or combination need not be established by direct evidence, but may be inferred or "implied from a course of dealing or other circumstances" (252 U. S. 99). The circumstances attending concerted action may warrant an inference that such concerted action is due not to accident but to agreement.

"There is a contention that 'there is not in the record any direct proof whatever of the terms of any conference or agreement participated in by any of the defendants. All that appears is that certain steamship owners consisting of firms, the identity of whose members is not established, operated steamers in the trade from New York to South African ports without competing with one another.' But more than that appears, and it cannot be assumed that the circulars that were issued and the concerted course of dealing under them were the accidents of particular occasions having no premeditation or subsequent unity in execution."

Thomsen vs. Cagser, 243 U. S. 66, 84.

In other cases this Court has itself found, or has sustained a verdict of a jury finding, an unlawful agreement or com-

bination from evidence of the distribution of circulars or similar documents and attendant circumstances.

"True it is that there is no agreement among the retailers to refrain from dealing with listed wholesalers, nor is there any penalty annexed for the failure so to do, but he is blind indeed who does not see the purpose in the predetermined and periodical circulation of this report to put the ban upon wholesale dealers whose names appear in the list of unfair dealers to supply the trade which they regard as their own. " " "

"But it is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred."

Eastern States Lumber Ass'n. vs. United States,
234 U. S. 600, 608-609, 612;

Cf. Lawlor vs. Loewe, 235 U. S. 522, 534-535.

II.

THE CLAYTON ACT.

(a) The amended declaration in the present case contains two counts, each alleging the same agreement between the defendant and jobbers to maintain resale prices (Record, pages 26-52). The first count alleges, as a violation of the Sherman Act, a refusal to sell to the plaintiff pursuant to such agreement. The second count alleges, as an unlawful discrimination in violation of the Clayton Act, a refusal to sell to the plaintiff at the same price the defendant sold

to other jobbers. At the trial the two counts were treated as substantially the same, except that the first charged a refusal to sell, the second a discrimination in price. On these counts the case went to the jury, which was instructed that a finding for the plaintiff on the first count would make it unnecessary to consider the second count (Record, page 444). The jury evidently found for the plaintiff on the first count, as the amounts found in the verdict are proportionate to the full periods from the time the plaintiff was "cut off" to the institution of suit and from the institution of suit to the date of the verdict [*supra*, page 6]. A verdict for the plaintiff under the second count would have been computed from the date of the passage of the Clayton Act, October 15, 1914 (Record, page 434). The Clayton Act in fact received little or no consideration at the trial or in the Circuit Court of Appeals and was but briefly referred to in the charge to the jury (Record, page 444). One exception was expressed as taken to so much of the charge as was given "under the illustration * * * used to define an unlawful discrimination within the meaning of the Clayton Act" (Record, page 453). As JUDGE ROSE, however, immediately pointed out, the illustration referred to (Record, pages 443, 453) had reference not to the Clayton Act but to the Sherman Act. This exception was directed to the Court's instruction that if the price named to the plaintiff by the defendant was named not merely to get a higher price from the plaintiff, but to prevent the plaintiff from getting goods at all, the jury might find that the naming of such a price was not merely a discrimination but a refusal to sell (Record, pages 443, 453).

The distinction drawn in the declaration and in the charge to the jury between a refusal to sell and a discrimination in price is, at least at the present stage of the case, wholly immaterial. Strictly speaking, the naming by the defendant of a prohibitive price was both a refusal to sell and a discrimination, *i. e.*, a refusal to sell *through* a discrimination

in price. The discrimination was the means, the refusal was the natural effect of the discrimination.

Entirely apart from the Clayton Act, the defendant is liable to the plaintiff for damages sustained by the plaintiff caused by an unlawful combination between the defendant and jobbers to maintain resale prices and by the prevention, *through such unlawful combination*, of the procurement by the plaintiff of goods at jobbers' prices. This is equally true whether the means by which the plaintiff is so prevented from getting goods at jobbers' prices be called a "refusal to sell" or a "discrimination in price." Whichever term be used, the thing done is a violation of the Sherman Act and the damage sustained is the loss of profits. In this case the damages awarded did not exceed the difference between the jobbers' price, \$2.95, and the general retailers' price, ranging from \$3.20 to \$3.40, which was named by the defendant to the plaintiff. Neither a refusal to sell nor a discrimination in price is *per se* actionable. Either is actionable, under the Sherman Act, when it is resorted to as a means of effecting the purpose of an unlawful combination.

(b) The ruling of the District Court on demurrer to the declaration was correct for the reason given and on the authorities cited by the District Court (Record, pages 11-15, *Fry & Son vs. Cudahy Packing Co.*, 232 Fed. 640). The unlawful discrimination complained of was discrimination between jobbers who were and jobbers who were not parties to unlawful price maintenance agreements. These unlawful agreements were the sole reason for discrimination in price and the enforcement of these agreements was the sole object of such discrimination. The unlawfulness of the agreements is a matter of law established by the decisions of this Court. That the enforcement of such agreements substantially lessens competition is also the basis of these decisions. There was no administrative question, distinct from the question of the unlawfulness of the price maintenance agreements, to be

first decided by the Federal Trade Commission. No question of rate-making or publication of rates was involved. The defendant had complete legal authority to fix its own prices without asking or notifying the Federal Trade Commission or any public authority. If, in the exercise of this legal right, the defendant overstepped legal limits and violated Section 2 of the Clayton Act by unlawful discrimination in price, then under Section 4 of the Clayton Act the plaintiff is expressly authorized to sue for the injury thereby sustained. No previous proceeding before the Federal Trade Commission is required (*Penn. R. R. Co. vs. International Coal Co.*, 230 U. S. 184, 196-197). Indeed no such proceeding at the instance of the plaintiff, or except at the instance of the Federal Trade Commission itself, is even authorized (*Cf. Federal Trade Commission vs. Gratz*, 253 U. S. 421, 427.)

Furthermore it is difficult to see how the doctrine of the line of cases following *Texas & Pacific Ry. Co. vs. Abilene Cotton Oil Co.*, 204 U. S. 426, and *Balt. & Ohio R. R. Co. vs. Pitcairn Coal Co.*, 215 U. S. 481, can ever be applicable to a violation of Section 2 of the Clayton Act. The Clayton Act differs from the Interstate Commerce Act not only in conferring no express right upon injured parties to institute proceedings by complaint before the Federal Trade Commission. This absence of such authority to institute proceedings before the Federal Trade Commission is emphasized by the express provision in Section 11 of the Clayton Act authorizing interested parties to *interfere* in proceedings instituted by the Commission. The Clayton Act further differs from the Interstate Commerce Act in the more important circumstance (already mentioned), that the Federal Trade Commission has no rate-making power whatever and that there is no requirement that schedules of rates or prices be filed with the Federal Trade Commission. In the absence of these features of the Interstate Commerce Act, all of which are lacking in the Clayton Act, the reasoning of this Court in the *Abilene* case and the *Pitcairn* case is inapplicable.

III.

DEFENDANT'S EXCEPTIONS AND ASSIGNMENTS OF ERROR IN
THE CIRCUIT COURT OF APPEALS.

The record contains some 157 bills of exceptions and 141 assignments of error by the defendant. These assignments of error occupy 85 pages of the record (Record, pages 459-543). As the Circuit Court of Appeals says, "exceptions were taken at almost every step of the trial" (Record, page 555). Indeed from the very outset objections to testimony were interposed by the defendant so frequently that Justice ROOSE was led to observe that such constant interruptions made it impossible to proceed (Record, pages 41-42, 432). The Circuit Court of Appeals apparently found nothing of importance in any of these multitudinous exceptions, except the failure of the District Court to direct a verdict for the defendant.

In *Buckley Powder Co. vs. DuPont Powder Co.*, 248 U. S. 55, 64-65, this Court said:

"We agree with the Circuit Court of Appeals that it is not necessary to deal specifically with all the details brought up by the dragnet of the plaintiff's exceptions and assignments of error, sixty-nine in number and occupying more than sixty pages of the record. *Central Vermont Ry. Co. vs. White*, 238 U. S. 507, 508, 509."

In *Ches. & Del. Canal Co. vs. United States*, 250 U. S. 123, 124, this Court said, of a record containing only 41 assignments of error:

"Such a record constrains us to repeat the following: 'This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the Court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on.' *Phillips & Culby Construction Co. vs. Seymour*, 91 U. S. 646, 648; *Grayson vs. Lynch*, 163 U. S. 468, and *Central Vermont Ry. Co. vs. White*, 238 U. S. 507."

At the present stage of this case it would be quite intolerable for the plaintiff to undertake to discuss 141 points raised by the defendant, in none of which either of the lower courts apparently found any merit, except the one point which has already been fully discussed, on which the Circuit Court of Appeals reversed not only the District Court, but its own previous decision in the *Welch* case. All that will now be attempted is a brief discussion of some of the points discussed in the defendant's brief in the Circuit Court of Appeals.

A.

RULINGS ON EVIDENCE.

136 of the defendant's bills of exceptions and 119 of its assignments of error relate to rulings on evidence. Most of these rulings were so obviously correct—or at least harmless to the defendant—as to merit little consideration.

The only question in connection with rulings on evidence which was apparently seriously urged by the defendant in the District Court and in the Circuit Court of Appeals was the question upon which the defendant apparently put its main reliance, although the Circuit Court of Appeals on the first writ of error in the *Welch* case had already decided this question adversely to the defendant's contentions. This question on which the defendant put such reliance was simply the question whether the doctrine of the *Dr. Miles Medical Co.* case should be overruled or so modified as to permit the Court or the jury in each case to say whether or not price maintenance agreements, such as were held by this Court in the *Dr. Miles Medical Co.* case to be unreasonable restraints of trade, are to be so regarded, according as the Court or jury may view the economic consequences of such agreements in the particular case. In short, the defendant in this case

made the same effort to distinguish or have limited or overruled the decision of this Court in the *Dr. Miles Medical Co.* case which was made in this Court, through the same counsel, in the *Boston Store* case. This case was argued in the Circuit Court of Appeals on January 15, 1918 (Record, page 550). The *Boston Store* case was argued in this Court on January 16, 1918 (246 U. S. 81). On the first writ of error in the *Welch* case the Circuit Court of Appeals had followed the decision of this Court in the *Dr. Miles Medical Co.* case and had limited the scope of the evidence accordingly. In the *Boston Store* case (decided March 4, 1918) this Court reaffirmed the doctrine of the *Dr. Miles Medical Co.* case, refusing to overrule or limit it. In *Schrader's* case this Court reiterated that in the *Colgate* case it had "no intention to overrule or modify the doctrine of *Dr. Miles Medical Co. vs. Park & Sons Co.*" (252 U. S. 99).

The real defense relied on by the defendant in this case was thus disposed of, adversely to the defendant, by the decision of this Court in the *Boston Store* case. It had already been disposed of, adversely to the defendant, by the Circuit Court of Appeals on the first writ of error in the *Welch* case. This defense in brief was, not that the defendant had not entered into price maintenance agreements with all the jobbers it dealt with, but that such agreements were *reasonable* restraints of trade and were *not*, as this Court had decided in the *Dr. Miles Medical Co.* case, *unreasonable* restraints of trade and consequently in violation of the Sherman Act. Indeed, until the *Colgate* case arose in the District Court, the point on which the Circuit Court of Appeals eventually reversed its former decision in the *Welch* case, viz., that there was no *formal* price maintenance agreement, was apparently not seriously urged by the defendant. The defendant's serious contention was evidently made not against the *existence* but against the *illegality* of its price maintenance agreements. After the *Colgate* case had arisen (but before it had been decided in the District Court) the Circuit

Court of Appeals of its own motion ordered a reargument in the present case (Record, page 552). This case was reargued after the decision of the lower Court but before the decision of this Court in the *Colgate* case. This case was, however, decided by the Circuit Court of Appeals after the decision of this Court in the *Colgate* case and solely on the construction—as the plaintiff maintains, misconstruction—by the Circuit Court of Appeals of this Court's opinion in the *Colgate* case.

The permissible scope of the evidence in the present case was thus defined by the Circuit Court of Appeals on the first writ of error in the *Welch* case.

"Evidence was admitted over the objection of the plaintiff: (1) That the profit of dealers on Welch's grape juice at the listed price prescribed by the defendant was the average profit on other groceries; (2) that the defendant was not in any combination with manufacturers of other kinds of grape juice to control the price; (3) that by the custom of trade the price at which the jobber is expected to sell is fixed by the manufacturer.

"All of this evidence was irrelevant and incompetent. The issues made by the pleadings were whether there was an unlawful combination to control the price of grape juice, or unlawful discrimination against the plaintiff in charging him a greater price than other jobbers. If there was such a combination to require all dealers to sell at the price fixed by the manufacturer upon the penalty of not being allowed to sell on an equality with other traders, and the plaintiff was the victim of it, it was no defense to show that the plaintiff was required to charge only an average profit, or that it was the custom of trade for manufacturers to violate the law. *Dr. Miles Medical Company vs. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. Nor would it avail the defendant, against the charges made by the plaintiff, to show that it had not violated the law by making a combination with manufacturers of other brands of grape juice."

Frey & Son vs. Welch Grape Juice Co., 240 Fed. 114, 116.

The rulings on evidence in the present case were in conformity with this ruling by the Circuit Court of Appeals. The correctness of this ruling and the irrelevance of such testimony are confirmed by the opinion of this Court in the *Colgate* case and in *Schrader's* case. When "the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser," the manufacturer's conduct is lawful, regardless of whether he succeeds in thus maintaining prices and whether, if he does, the economic results in the particular case may be deemed beneficial or injurious to the public. When, on the other hand, the manufacturer "enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices," then "the parties are combined through agreements designed to take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States," and the manufacturer's conduct is unlawful, regardless of the supposed economic advantages which may be claimed to result in a particular case from such a restraint of trade (252 U. S. 99-100).

It is, of course, not overlooked that this Court itself has been divided in opinion as to the legality of price maintenance agreements. The majority of this Court has held such agreements to be illegal. A minority has held the contrary opinion that such agreements are—or ought to be—legal. No member of this Court, however, has suggested that the legality or illegality of such agreements should be determined by the Court or jury in each case by weighing the supposed economic advantages and disadvantages resulting therefrom in the particular case. Such a test would be open to all the objections to the doctrine of the *Dr. Miles Medical Co.* case which were presented in the dissenting opinion in that case, and also to the more serious objection that thereby no stand-

and at all would be established. Whatever economic advantages or disadvantages may result from prohibiting or permitting price maintenance agreements, it is safe to say that *either prohibition or permission* of such agreements would be *preferable* from an economic point of view to the absence of any rule at all and the submission of the legality of such agreements at large to the Court or jury in each individual case.

STRAUSS DEPOSITION.

Apart from particular questions which were excluded on cross-examination of witnesses for the plaintiff, and two obviously irrelevant questions to the defendant's witness Edgerton (Record, pages 309, 310), the only evidence offered by the defendant which was excluded was part of the deposition of E. A. Strauss, a Department Manager of the defendant at Chicago. The portion of this deposition beyond a certain point (marked by the trial judge but not shown in the record) was excluded (Record, pages 330-332).

No fact—certainly no relevant fact—testified to by any other witness is denied by Mr. Strauss in his deposition. Nor are any relevant new facts testified to by Mr. Strauss. His deposition consists not in a denial, but rather in a labored justification, of the price maintenance agreements between the defendant and the jobbers with whom it deals. Nor does he, except in the argumentative sense of refusing to *call* them "agreements," question the existence of the price maintenance agreements or understandings between the defendant and jobbers. The *facts* which tend to show or confirm such agreements or understandings he not only does not deny but confirms. He does not deny the distribution of the circulars offered in evidence or the following up of such distribution by personal interviews. He even emphasizes the mutuality of interests of the jobbers and the defendant in these price

maintenance agreements by stating the assurances given by the defendant to jobbers that it will protect them against competition, *i. e.*, that it will *perform* these price maintenance agreements.

Thus Mr. Strauss says that the defendant had not at any time sold any Distributing Agent goods "with any agreement or understanding—agreement, I mean to say—as to just what he had to sell them for" (Record, page 362). After elaborating what he considers the evils of "price cutting" Mr. Strauss says—"Under those circumstances naturally we talk to him [the Distributing Agent] and ask him to keep that price and give us his co-operation." * * * "If he co-operates in the price—the co-operation and the price naturally to a certain extent go hand in hand * * *" (Record, page 364). "We could not possibly expect co-operation with the general run of distributing agents unless we could reasonably say to them, 'We will do all that we possibly and reasonably can to protect you against any unreasonable and unfair competition' * * *" (Record, page 352).

The plaintiff objected to the admission of the Strauss deposition on the grounds (1) that Mr. Strauss, after discussing at length the economic advantages to the defendant of price maintenance agreements, refused to answer on cross examination other questions concerning the defendant's business, its profits, costs and the like, tending to elucidate his testimony [18 C. J. 747], and (2) that the subject-matter of the deposition was irrelevant under the decision of this Court in the *Dr. Miles Medical Co.* case and the decision of the Circuit Court of Appeals in the *Welch* case. The Court sustained both objections (Record, page 331), excluding a portion of the deposition [*supra*, page 51] as irrelevant, after having first stated to counsel for the defendant that any particular portion of the deposition would be admitted which counsel would point out as tending to negative either the distribution by the defendant of its circulars among jobbers (*i.*

c., the making of price maintenance agreements) or the "cutting off" of jobbers who violated such agreements (Record, pages 404-406).

In so excluding part of the Strauss deposition the District Court followed the ruling of the Circuit Court of Appeals in the *Welch* case, which ruling, for the reasons already stated, is in accord with the decisions of this Court from the *Dr. Miles Medical Co.* case down to and including the *Colgate* case and *Schrader's* case.

B.

CHARGE TO THE JURY.

At the close of the evidence the plaintiff offered some dozen prayers for instructions to the jury and the defendant offered 68 prayers, which cover 18 pages of the record (Record, pages 413-431). In a comprehensive but concise charge (Record, pages 434-446), JUDGE ROSE reviewed the whole case, charging as a matter of law established by the *Dr. Miles Medical Co.* case and by the Circuit Court of Appeals in the *Welch* case, that price maintenance agreements or combinations are unlawful, but leaving to the jury, as exclusively questions of fact, the existence or non-existence of any such agreement or combination and the amount of damages, if any, thereby sustained by the plaintiff.

Before delivering his charge to the jury JUDGE ROSE stated that it was impossible to act on 68 propositions of law in the limited time available, but that after he had finished his charge, if there were any special points that either side did not think had been sufficiently covered, if counsel would bring them to his attention by a request to charge, he would be very glad then to consider them. He stated that many of the defendant's 68 prayers would be dealt with, adversely or favorably, in his charge and those that were not dealt with

could be called to his attention and, if he considered them favorably, he would charge them (Record, page 432).

After the conclusion of the charge the defendant noted some 20 special exceptions to the charge and to the Court's responses to such exceptions to the charge (Record, pages 449-459). The defendant did not, however, after the charge direct special attention to any of its 68 prayers or make a special request to charge any one or more of such prayers. The subject matter of all of the prayers was comprehensively covered in the charge. If, however, amid this multitude of prayers, there was any special point which the defendant deemed to have been overlooked in the charge, it was the defendant's duty to call such point to the attention of the Court. It is too late now to set up any of these 68 prayers as reversible error in the judgment of the District Court (*Pennsylvania R. R. Co. vs. Minds*, 250 U. S. 368, 371-375).

Practically all of the defendant's 20 special exceptions to the charge to the jury related to comments on the evidence. In response to one of these special exceptions, JUDGE ROSE reiterated his ruling that this Court had held price maintenance agreements to be unlawful. In response to almost every other special exception, JUDGE ROSE reiterated that the points made by the defendant were questions of fact for the jury and that they might be so argued before the jury (Record, pages 450-458). (In the District of Maryland the charge to the jury is delivered *before* the arguments of counsel.) In particular, the Court reiterated that the existence or non-existence of a price maintenance contract or agreement was a question of fact for the jury (Record, pages 456-457).

In this broad submission of the case to the jury the defendant at least was not prejudiced. For the reasons already fully discussed, the Court on the uncontradicted evidence might well have given a peremptory instruction to find an

unlawful agreement or combination. Instead of so ruling, the Court left this question to the jury. The action of the District Court in this respect furnishes no just ground for complaint by the defendant.

MEASURE OF DAMAGES.

The defendant's three last exceptions were taken to the portion of the charge relating to the measure of damages. In response to all of the defendant's objections to specific comments in the charge on the evidence as to damages, JUDGE ROSE replied that in these respects the charge was not binding upon the jury and the defendant was free to argue these questions of fact before the jury (Record, pages 457-458). In response to a general objection that the measure of damages "is not properly set out in the charge" JUDGE ROSE asked the defendant's counsel to state what would have been proper, to which the answer made was "that under the proof in this case there is no proper damage" (Record, page 458).

As the question of the amount of actual damages was thus submitted entirely to the jury, the only question now reviewable is whether there was any legally sufficient proof of damages to go to the jury.

The law as to proof of damages in this case was thus stated by the Circuit Court of Appeals on the first writ of error in the *Welch* case.

"The damages recoverable were those which arose from the unlawful interruption of the plaintiff's business in selling Welch's grape juice. This damage could not as a matter of law be confined to the loss of profit on specific sales which the plaintiff might be able to prove; for in such case, when a merchant's business is broken into, it would ordinarily be impossible for him to know and prove all specific sales he had lost. The plaintiff testified that in the year 1911, before the alleged discrimination began, it sold 190 cases of Welch's

grape juice, and it also proved the average increase of its general business for the succeeding years. This average increase of general business was evidence from which the jury could have inferred the probable increase of the sale of this brand of grape juice, had the plaintiff been able to purchase it on the same terms as other jobbers. This evidence, together with that offered by the plaintiff of the per cent. of profit made by it on sales of the grape juice, should have been submitted to the jury as data from which in connection with any other relevant facts they could arrive at the damage which the alleged combination and discrimination caused the plaintiff. 1 Sedgwick on Damage (9th Ed.), § 182, and cases cited."

Frey & Son v. Welch Grape Juice Co., 240 Fed. 114, 117.

The charge in the present case was, of course, in accord with this opinion of the Circuit Court of Appeals in the *Welch* case. In the present case the plaintiff had an established business in the sale of Old Dutch Cleanser. This part of the plaintiff's business was destroyed by the unlawful combination between the defendant and other jobbers. Definite evidence was offered, covering a period of years before and after the plaintiff was "cut off," showing year by year the volume of the plaintiff's general business, the cost, in dollars and in percentage, of conducting such business, the amount of sales of Old Dutch Cleanser and the plaintiff's profit on such sales (Record, pages 79-92).

This evidence fully meets the requirements as to proof of damages laid down in *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, relied on by the defendant in this case. In the *Hartman* case there was no evidence of the volume, expenses or income of the plaintiff's business before or after the acts complained of. It was accordingly held in that case that there was nothing but speculation to support a verdict.

The verdict of the jury in the present case indicates that the jury made no allowance to the plaintiff for the probab-

ity that, if the plaintiff had not been "cut off," its sales of Old Dutch Cleanser would have increased with the increase of its general business. The verdict was limited to the profit the plaintiff would have derived from sales of Old Dutch Cleanser equal in amount to its average sales during the three years before it was "cut off" [*supra*, page 6]. The jury evidently accepted the plaintiff's evidence that its business in Old Dutch Cleanser (constituting less than one-half of one per cent. of its general business) could have been conducted, had it not been "cut off," without any additional expense [*supra*, page 5]. Had the jury held otherwise on this point, all the necessary evidence of the cost of conducting the plaintiff's general business was before the jury.

In the defendant's brief in the Circuit Court of Appeals, the exclusion, on cross-examination of witnesses for the plaintiff, of questions as to the *existence* of other cleansers sold in competition with Old Dutch Cleanser was complained of as the exclusion of evidence of *mitigation of damages* (Assignments of Error Nos. 68-74, 113—Record, pages 483-484, 502, 137-141, 146, 287). As a matter of law, the testimony thus excluded did not tend to prove any mitigation of damages, as the *existence* of other cleansers does not tend to prove that the plaintiff could have sold other cleansers to customers who want Old Dutch Cleanser. As a matter of fact, the evidence thus excluded was offered by the defendant, not in mitigation of damages but expressly on the defendant's theory that the mere fact that there were other cleansers in competition with Old Dutch Cleanser would make *lawful* such price maintenance agreements, in restraint of trade and competition in Old Dutch Cleanser, as were held by this Court in the *Dr. Miles Medical Co.* case to be *unlawful* (Record, pages 146, 138).

The only basis in the record for the suggestion that the plaintiff could have mitigated its damages by substituting other cleansers for Old Dutch Cleanser is a letter from the plaintiff to the defendant written only a month after the

plaintiff was "cut off" (Plaintiff's Exhibit No. 8, Record, pages 53-54). This letter proved to be a bit of optimism dispelled by subsequent events (Record, page 137). To put the matter mildly, the jury was at least justified in finding that the plaintiff could not have induced its customers to accept substitutes for an article possessing, to any appreciable degree, the intrinsic merit or the benefits of advertising which the defendant so fulsomely ascribes to Old Dutch Cleanser.

The defendant also in its brief in the Circuit Court of Appeals cited, as instances of excluded evidence of mitigation of damages, a question, on cross-examination of one of the plaintiff's witnesses, whether this very litigation was "good publicity" for the plaintiff's business (Record, page 114) and other questions of similar purport. As *JUDGE ROSE* rather vividly illustrated (Record, page 122), the defendant in an action of tort cannot set off against actual damages sustained by the plaintiff any such remote collateral benefits which may indirectly accrue to the plaintiff through the very tort complained of. *JUDGE ROSE* stated emphatically that no damages could be awarded by the jury to the plaintiff except strictly *compensatory* damages (multiplied by three, pursuant to the statute) (Record, page 117). Such actual compensatory damages, however, cannot be offset by consideration of remote collateral consequences (*Southern Pac. Co. vs. Darnell-Tenzer Co.*, 245 U. S. 531, 533-534).

In this instance also the only basis for the suggestion that the plaintiff in fact did derive any collateral advantage from the tort complained of is a letter, perhaps somewhat boastful, from the plaintiff to the defendant, written ten days after the plaintiff was "cut off" (Record, page 49), which also proved to be undue optimism (Record, page 120).

This case was fully and fairly tried and submitted to the jury in the District Court. The jury found for the plaintiff on the facts and awarded damages on a conservative basis which was more than fair to the defendant. The verdict of

the jury is amply supported by evidence. The rulings of the District Court are in accord with the decisions of this Court from the *Dr. Miles Medical Co.* case to *Schrader's* case and with the decision of the Circuit Court of Appeals on the first writ of error in the *Welch* case. The Circuit Court of Appeals found no fault with the conduct of the trial or with the rulings of the District Court, except that it reversed the action of the District Court and its own previous decision in the *Welch* case solely by reason of its own misapprehension of the opinion of this Court in the *Colgate* case. The error of the Circuit Court of Appeals in thus misconstruing the opinion in the *Colgate* case, and the correctness of the rulings of the District Court and of the former opinion of the Circuit Court of Appeals in the *Welch* case, are established by the later opinion of this Court in *Schrader's* case. Accordingly the judgment of the Circuit Court of Appeals in this case should be reversed and the judgment of the District Court should be affirmed.

Respectfully submitted,

HORACE T. SMITH,
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Counsel for Fieg & Son, Inc., Plaintiff in Error.



FILED

JAN 24 1921

JAMES D. WANER,
CLERK.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1919.

No.  200

FREY & SON, INC., a Corpora-
tion,

Plaintiff-in-Error,

versus

CUDAHY PACKING COM-
PANY, a Corporation,
Defendant-in-Error.

In error to the
United States
Circuit Court
of Appeals for
the Fourth
Circuit.

**BRIEF ON BEHALF OF DEFENDANT-
IN-ERROR, CUDAHY PACKING
COMPANY.**

GILBERT H. MONTAGUE,
THOMAS CREIGH,
JOSEPH W. GOODWIN,
Counsel for Defendant-in-Error.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1910.

No. 597.

FREY & SON, INC., a Corporation,
Plaintiff-in-Error,

versus

CUDAHY PACKING COMPANY, a
Corporation,
Defendant-in-Error.

In error to the
United States
Circuit Court of
Appeals for the
Fourth Circuit.

**BRIEF ON BEHALF OF DEFENDANT-
IN-ERROR CUDAHY PACKING
COMPANY.**

Statement of the Case.

Though the probable date of argument of this case is less than three weeks hence, the brief for plaintiff-in-error has not yet been filed or served, and counsel for defendant-in-error who will argue this case has already entered upon a long trial in the District Court for the Southern District of New York, which he expects will still be continuing when this case is reached for argument. The

present brief for defendant-in-error has therefore been prepared without seeing the brief for plaintiff-in-error and is unavoidably longer than might otherwise be necessary.

This is an appeal by Frey & Son, Inc. (plaintiff-in-error here, plaintiff in the District Court, and hereinafter called "plaintiff"), upon a writ of error of this court to the Court of Appeals for the Fourth Circuit (Transcript of Record, pages 569-570), issued upon plaintiff's petition for writ of error and assignment of errors (565-568) which recites, as the first alleged error, the direction by the Circuit Court of Appeals of "final judgment to be entered for the defendant below" (568).

This Court will notice, however, that the Circuit Court of Appeals at first merely reversed the judgment which plaintiff had recovered in the District Court, and directed the latter Court "to set aside the verdict and grant a new trial" (557), and that it was only after plaintiff had waived its right to a new trial and had consented to the entry of final judgment and had petitioned the Circuit Court of Appeals to modify its order above mentioned accordingly (558-561) that the Circuit Court of Appeals directed final judgment for Cudahy Packing Company (defendant-in-error here, defendant in the District Court, and hereinafter called "defendant") (563-564).

Consequently, even if the Circuit Court of Appeals erred (which defendant denies) in one or all of the alleged errors set forth in plaintiff's petition for writ of error and assignment of errors (565-568) on which the writ of error of this Court was issued (569-570), it nevertheless follows from the foregoing that this Court will examine the

defendant's entire assignment of errors in the District Court (459-543) and if this Court finds there in any reversible error whatsoever, this Court will affirm the order of the Circuit Court of Appeals directing final judgment for the defendant.

Persuasive, if not controlling, on this appeal, is the fact that on November 17, 1919, this Court denied a petition for writ of certiorari in *Frey & Son, Inc. vs. Welch Grape Juice Co.*, 251 U. S., 551, which case was decided by the Circuit Court of Appeals (*Welch Grape Juice Co. vs. Frey & Son, Inc.*, 261 Fed., 68) on the same day as the present case, and in which the Circuit Court of Appeals stated that "the facts differ in no essential particular from those in the case of *Catalhy Packing Company vs. Frey & Son, Inc.*, 261 Fed., 65, C. C. A. decided this day."

The Amended Declaration.

The original declaration (2-13), filed May 10, 1915, was, after various proceedings outlined below, superseded by an amended declaration (26-32) filed May 25, 1917, at the close of the trial.

The first count alleges that the plaintiff is engaged in interstate commerce as a wholesale grocer in Baltimore; that Old Dutch Cleanser is a scouring compound manufactured by the plaintiff-in-error (hereinafter called "the defendant") and sold to many wholesale grocers and used by many people; that for many years the defendant has had an "understanding and agreement with most of the jobbers, wholesale grocers and other grocers throughout the United States, by which understanding and agreement it has and does sell

to said jobbers, wholesale grocers and other grocers said Old Dutch Cleanser upon the understanding and agreement that they, the said jobbers, wholesale grocers and other grocers will sell said Old Dutch Cleanser for certain fixed prices to the retail trade, and that the said understanding and agreement aforesaid requires of the said jobbers and the said wholesale grocers that they will not sell to retailers unless they sell at a certain specific price, and in the said understanding and agreement with the said jobbers and wholesalers said defendant requires that they sell the said Old Dutch Cleanser at a fixed and certain price to be determined by the said defendant, and not by the said jobbers, wholesale grocers and other grocers who purchase the said Old Dutch Cleanser; and by said agreement and understanding the defendant prevents the plaintiff from buying Old Dutch Cleanser from the other jobbers and wholesale grocers; and prevents said jobbers and wholesalers from selling said Old Dutch Cleanser to the plaintiff; * * * that the said understanding and agreement aforesaid was and is in restraint of trade and is null and void in that it limits and restrains the sale of said Old Dutch Cleanser after the said defendant has parted with its title thereto; and plaintiff, refusing to be a party to such agreement and understanding, is not permitted to purchase the same from the defendant, and by reason thereof is prevented and hindered in its business, and is prevented and hindered from having the said Old Dutch Cleanser in stock in its store" (28); that on February 4, 1914, and before and since, the defendant "has refused to sell to the said plaintiff said Old Dutch Cleanser unless the said plaintiff

would enter into the agreement and understanding aforesaid" (28) ; that the "defendant, by the agreement and understanding aforesaid, has prevented plaintiff from buying the said Old Dutch Cleanser from other jobbers and wholesale grocers" (28-29) ; that the "plaintiff is unable to obtain the same unless it enters into an agreement and understanding with the said defendant that it as a wholesaler will sell the Old Dutch Cleanser at a price fixed by the said defendant" (29) ; that by not having Old Dutch Cleanser in stock, the plaintiff "is unable to fill numerous orders and demands for the said Old Dutch Cleanser" and "is deprived of the ordinary profit which it would have derived from the sale," and has been damaged in the sum of \$30,000 (29).

The second count starts out substantially like the first, but omits the allegations about restraint of trade and the events of February 4, 1914, and the damages, and instead alleges that on March 12, 1915, and before and since, the defendant "has sold certain quantities of the said Old Dutch Cleanser at a certain price to wholesale grocers in the City of Baltimore, being persons similarly situated as the plaintiff, and has refused to sell like quantities of the said Old Dutch Cleanser to the plaintiff at that price, but the defendant demanded and required that the plaintiff pay a much higher price therefor; the defendant thereby controlling and intending to control the sale of the said Old Dutch Cleanser by the wholesale grocers to the retail grocers within the United States, and to control the price charged for said Old Dutch Cleanser when sold by the said wholesalers to the retailers, and thereby lessening competition among the said

wholesale grocers with respect to the price charged for said Old Dutch Cleanser when sold by the wholesalers to the retailers; and the defendant also intending to compel and compelling the retailers to pay a certain fixed price for the said Old Dutch Cleanser which they purchased from the wholesalers, and preventing and intending to prevent the said plaintiff, by reason of the acts aforesaid, from buying and selling the said Old Dutch Cleanser" (31-32); that in consequence the plaintiff has lost the sale and profit "which would otherwise have accrued to it by the buying and selling of said Old Dutch Cleanser aforesaid," and has been damaged in the sum of \$30,000.

Demurrers, Motion for Bill of Particulars, and General Denial.

To the second count above outlined (constituting the third and fourth counts of the original declaration) the defendant demurred on the ground that under the Acts of Congress, the jurisdiction of the transactions complained of is committed to the Federal Trade Commission, and that the declaration failed to aver that the jurisdiction of the Commission had been invoked or exercised. This demurrer having been overruled (14-15), the defendant demurred to both counts (constituting all four counts of the original declaration) on the ground that the alleged refusal to sell and the alleged demand of an exorbitant and prohibitive price and the alleged offer to sell and discrimination and monopoly, did not, under the circumstances alleged in this count, constitute a violation of law. These demurrers having been overruled (16-17), the de-

fendant demanded a bill of particulars which should state, among other things, "the names and addresses of the jobbers, wholesale grocers and grocers with whom the defendant made any alleged resale contract or contracts * * *. Whether such alleged resale contract or contracts with jobbers, grocers and wholesale grocers were oral or written * * *. When, where, through whom and by what acts the defendant has tried to prevent jobbers, grocers and wholesale grocers from selling to the plaintiff, and the names and addresses of such jobbers, grocers and wholesale grocers * * *. The names and addresses of and the number of persons previously customers of the plaintiff who have gone to other grocers or wholesale grocers for goods other than Old Dutch Cleanser because of defendant's alleged acts preventing plaintiff from selling Old Dutch Cleanser * * *. The amount of profits on Old Dutch Cleanser lost to the plaintiff because of the defendant's alleged acts and the amount of profits on other goods, the sale of which is alleged to have been prevented by the said acts * * *. At how much less than the defendant's prices to retailers Old Dutch Cleanser can be sold at a fair profit, and at what price the plaintiff sold Old Dutch Cleanser to retailers * * *. In what manner and to what extent the plaintiff was damaged in and about its business as a wholesale grocer by defendant's alleged refusal to sell to the plaintiff, giving specific instances of such damage" (17-18). This demand for a bill of particulars having been wholly disallowed by the Court (21), the defendant pleaded general denial (21). When, at the close of the trial, the plaintiff filed its amended declaration, it was stipulated that these

demurrers, motion for bill of particulars and plea of general denial should stand as against the amended declaration (32, 33, 412).

The Evidence.

Prior to February 3, 1914, the plaintiff had bought Old Dutch Cleanser from the defendant. On several occasions, *months and years before any of the transactions in this action*, representatives of the defendant had inquired of the plaintiff about price cutting (41-43, 45, 75, 204).

On February 3, 1914, the plaintiff mailed to the defendant an order for 250 cases of Old Dutch Cleanser (45). On February 4, 1914, the defendant acknowledged this order, and stated that, if the plaintiff would remit "at the rate of \$3.20 per case, less 2 per cent. for cash," the order would be promptly delivered (45).

On April 4, 1913, the defendant had issued to the trade a "General Sales List" (195), in which it had stated:

"For the practical and economical distribution to the consumer by the General and Retail trade, this sales list provides a basis of cost leaving the merchant a substantial, in fact, a liberal profit—as per schedule shown on next page—which we trust may be generally maintained both in the interest of a fair profit for the merchant's investment, risk and work as well as in support of the important advertising policy which we have followed for a number of years and which we expect to continue in the future.

"In fairness to all of our retail customers, we consider that uniformity of trading terms and prices are essential, and our distributing agents will co-operate with our own specialty sales force to this end" (195).

The "schedule shown on next page" (195) was as follows:

Merchant's Profit.

"Purchases in following Quantities	Cost Per Case	Profit Per Case	Percent Profit on Cost	Cost Per Can	Net Profit Per Can
1 Case Lots	\$3.40	\$1.40	41.2%	7c.	3c.
5 Case Lots	3.30	1.50	45.5/10%	6 $\frac{1}{2}$ c.	3 $\frac{1}{4}$ c.
10 Case Lots	3.25	1.55	47.7/10%	6 $\frac{3}{4}$ c.	3 $\frac{1}{4}$ c.
25 Case Lots & over	3.20	1.60	50%	6 $\frac{3}{4}$ c.	3 $\frac{1}{4}$ c.

"OLD DUTCH CLEANSER is packed in handy sifter top cans (48 to the case) selling regularly at 10¢ per can to the consumer and so exclusively advertised by the manufacturers."

Elsewhere in this General Sales List the defendant had stated that "freight will be prepaid . . . to all railroad stations" upon lots of five cases and upwards, and that "this list supersedes and cancels all previous lists" (195). Both statements were in accordance with the facts (92, 93, 175, 273). What the plaintiff's witnesses in their testimony frequently refer to as "retail price" is simply the price schedule set forth in this General Sales List.

On April 6, 1914, the defendant had issued a list, entitled "Distributing Agents and Their Compensation" (307), in which it had stated:

"For the most practical and economical merchandising and distribution to the trade, we appoint Distributing Agents, same being taken from business houses doing an exclusive jobbing trade.

"We ask these distributors for their earnest support in advancing the interests of Old Dutch Cleanser and other products in this list, and in furthering their distribution and consumption.

"We canvass the general trade steadily through a large, promotive advertising and soliciting force of our own.

"To insure the availability and success of their work and our important and constant national advertising—as well as in the interest of the trade—uniformity and equality as to terms, delivery and price is essential.

"It is, therefore, required of our Distributing Agents that they fully co-operate with us in this direction, as per terms, conditions and prices laid down in our published General Sales List.

"The goods that we deliver to our Distributing Agents are for sale to our mutual retail trade; and it is not intended that our Distributing Agents sell same to other wholesalers, as we are prepared to distribute through them, in all cases, on the terms and conditions of our published sales provisions.

"As remuneration to our Distributing Agents for their services in this work and for their investment, labor and risk in acting in our behalf in distributing these products to the trade, we allow the following—subject to withdrawal or change without prior notice:

"OLD DUTCH CLEANSER (48-10c. cans).....	40c.	Per case
"White Flag Laundry Soap (100-5c. cakes).....	40c.	off
"Dutch Hand Soap (48-10c. cakes).....	40c.	the
"Dutch Hand Soap (50-5c. cakes).....	20c.	Single
"Parrot Metal Polish (36 Half-pint cans).....	40c.	Box
"Parrot Metal Polish (24 Pint cans).....	55c.	Price

These allowances

with additional quantity allowances of—	apply to orders for
2½c. per case in minimum 100 case lots	one or assorted
or 5c. " " " " 250 " "	products in this
or 7½c. " " " " carload "	list and Lilac Rose
	Soap.

"QUANTITY ALLOWANCES apply only to orders in one delivery and when intended for distribution solely to the retail trade of the Distributing Agent ordering the shipment.

"We especially desire to point out that this remuneration to our Distributing Agents may not be given away by them—wholly or in part—to any class of trade, either other jobbers, semi-jobbers, retailers or consumers."

Elsewhere in this list (307), the defendant had stated that "*this list supersedes and cancels all previous lists.*" This statement was in accordance with the facts (273). What plaintiff's witnesses in their testimony frequently refer to as "wholesale price" is simply the General Sales List price schedule *less* the Distributing Agents Compensation above mentioned.

Following the defendant's letter to the plaintiff of February 4, 1914, about quoted, the plaintiff's president, Mr. Frey, wrote the defendant, expressing surprise, and stating that, if the defendant had "any form of affidavit concerning the price maintenance feature," he would "be pleased to sign same," and added that he would call at the defend-

ant's office in New York (47). Mr. Frey called as he promised and though his price cutting was mentioned, nothing was said about any affidavit, and he was told that the matter was beyond the control of the defendant's New York office and was in the hands of the Chicago office (48). On February 14, 1914, Mr. Frey wrote the defendant:

"The action taken by you in your letter of the 4th instant would be one of the very best boosts for me if I desired to make use of it through our trade but I have no desire at all to go into the market to demoralize the price of your goods, as that is not our policy of doing business, but on the other hand, our policy has always been, and still is, to co-operate with the manufacturer. I would say to you, however, that your goods are being generally rebated by every jobber here but in a very careful manner, which they can do by reason of the fact that they employ salesmen, whereas our business is entirely done in the city and out of town through the mail and everything is open and above board and if there has been any rebating done it has been done in such a way that it has escaped any office records that might come under my observation.

"I enclose you a copy of our last catalogue showing our quotations on your goods which is sent to 11,000 merchants in this section of the country and which is our only selling medium.

"I would be pleased to hear from you advising me if there is not some basis on which we can settle this matter and would greatly

appreciate any information that you can give me so that I can ascertain who has been giving these relates' " (49-50).

That the plaintiff had in fact been rebating on Old Dutch Cleanser in spite of these protestations of Mr. Frey to the contrary, has been admitted by Mr. Frey (50, 51, 94, 95).

On February 16, 1914, the defendant acknowledged receipt of Mr. Frey's letter last above quoted and stated that the defendant had nothing to add to what had previously been stated to Mr. Frey, and that the defendant would take care of the plaintiff's orders at General Sales List prices, "remittance less two per cent. for cash to accompany each said order" (50). Mr. Frey replied on February 26, 1914: "We, of course, would in no way be interested in your goods under the proposition outlined. * * * We are today turning all the papers in this matter over to the U. S. District Attorney to ascertain exactly what our rights in the premises are, also, of course, giving them your published jobbers prices and the correspondence we have had on the subject" (53). To this letter the defendant apparently made no reply.

Meanwhile, on February 25, 1914, Mr. Frey circulated the following public statement: "We are glad to fight for low prices for the retailer. We have just been notified by the Cudahy Packing Company that they will not sell us at regular jobbers prices. They make Old Dutch Cleanser. This is another instance of the jealousy of the high-priced jobbers who try to have us cut off whenever possible. * * * We welcome all the fights they want to bring. The retailer is realizing more and more that this house is his greatest friend. We realize

that the success of the retail grocer means our success, and the retailers are supporting us more and more daily as proven by our enormous increase in sales. Keep all prices confidential. Why do you play into the hands of our competitors by showing our invoices and telling them what you pay us for your goods. Remember you are the one who suffers if the prices are raised on you. And remember that if it weren't for Frey you would have much more for your goods than you do. Now don't worry about Old Dutch Cleanser. We have lots of it and can supply you regularly. Send your orders to Frey and you help yourself to make a greater success of your business" (109). Mr. Frey testified that in accusing "the high-priced jobbers who try to have us cut off whenever possible" he "did not refer to any high-priced jobber in particular in that statement. All of them as a class I refer to. I did not have any jobber in mind at all, no particular jobber. I had all the Baltimore jobbers in mind" (109); that "when I said, 'we have lots of it and can supply you regularly' I meant that I hoped that we would have lots of it" (109); and that in fact "we did not have lots of it" (110).

On March 6, 1914, referring to a question regarding the delivery of a box of another Cudahy product, Mr. Frey wrote the defendant: "After advising us that you would not sell us Dutch Cleanser any longer, we sold out the balance of your other products that we had on hand. Of course, we will not handle any of them as long as we are not permitted to handle the entire line on the proper basis. I am very glad to say that we have been very successful, in the sale of other cleansers which we have substituted on orders for Old Dutch Cleanser" (54). To this letter the defendant apparently

made no reply. On March 20, 1914, Mr. Frey wrote the defendant: "Kindly send us 250 cases of Old Dutch Cleanser" (54). To this the defendant replied on March 25, 1914: "If you will be kind enough to remit us at the rate of \$3.20 per case, less 2% for cash, we shall be glad to give you an order on our warehouse for Old Dutch Cleanser in any quantity from 25 cases upwards" (54). On April 1, 1914, Mr. Frey wrote the defendant: "If there seems to be any principle involved, do you not think that you have had satisfaction enough by having taken the action you have taken and do you not think that it is time now for us to get together and co-operate in the distribution of Old Dutch Cleanser" (56). To this letter the defendant apparently made no reply. Meanwhile, on April 4, 1914, Mr. Frey circulated the following public statement:

"There are two articles we are not handling. These are 'ACORN MILK' and 'OLD DUTCH CLEANSER' (142). * * *

"As to 'Old Dutch Cleanser,' the Manufacturer refused to supply us at the Jobbers price, because they say we won't uphold their prices.

"Our Mr. Frey has taken the matter up with the Department of Justice at Washington, who now have the subject in hand.

"During his visit, the Department advised him that any jobber who agrees when they buy goods from a Manufacturer to sell at a certain fixed price, enters into a combination to maintain price, which action is absolutely contrary to law, so that the Jobber agreeing to

maintain a price is equally as guilty as the Manufacturer who insists on it.

"With such Scouring Compounds as Spotless Cleanser, Swift's Pride Cleanser, Balditt's Cleanser, Bon Ami, Sil San, Bestene, etc., we do not feel that the trade will miss 'Old Dutch Cleanser' very much. It is only natural that the retailer will push the goods that pay him the most profit" (142-143).

On April 18, 1914, Mr. Frey wrote the defendant: "I would be very pleased if you will ship us 250 cases of Old Dutch Cleanser" (56). To this the defendant replied on April 20, 1914: "Our Chicago Office recently quoted you, and the subject of your orders for Old Dutch Cleanser should be, therefore, taken up with them" (57). On April 22, 1914, Mr. Frey wrote the defendant: "Kindly instruct your New York office to deliver us 250 cases of Old Dutch Cleanser" (57); to which the defendant replied, on April 24, 1914, enclosing a copy of its letter of March 25, 1914, to Mr. Frey. Then came a lull in the correspondence, until the plaintiff received from the defendant a form letter, dated May 16, 1914, calling attention to margarine, which is another Cudahy product (58); whereupon on May 25, 1914, Mr. Frey wrote the defendant:

"We would not care to take up anything at all with your Company owing to the fact that we are not at present doing business with you, by reason of the attitude taken by your Mr. Straus on Old Dutch Cleanser.

"We have sold out all the products that you manufacture and have refused to buy any

of them at all as long as you refuse to sell us Old Dutch Cleanser at the proper price. Furthermore, I regret to have to say that if I find any of the Wholesale Grocers handling your Margarine I will feel compelled to stock this goods of the Manufacture of one of your competitors, as I am fully determined that if Mr. Straus is looking for a fight in Baltimore he is welcome to it and we will, most certainly, be found to be strict competitors on any article that the Cudahy Company attempts to market in Baltimore.

"We have refused to handle any orders taken by your men on Grape Juice this season" (58-59).

To this letter the defendant apparently made no reply.

On July 13, 1914, Mr. Frey wrote the defendant: "It certainly appears to me that we should be able to get together and cooperate in the distribution of Old Dutch Cleanser" (59). To this letter the defendant apparently made no reply. On November 13, 1914, Mr. Frey wrote the defendant:

"We have now been off of your distributing list for about a year, not handling any of your products at all.

"We have simply advised our trade that we did not handle any of them, and we trust that you have therefore had no complaints of any kind from this territory. Whether your total output has been as large as previously or not we of course cannot tell, although we know of no reason why it should not have been, as you create the demand and not the jobber.

"However, we do not feel that the purpose at which you aimed has been achieved at all. That is, the elimination of price cutting.

"Yesterday for the first time since ceasing to buy direct from you, we wanted a case of Old Dutch Cleanser for one of our particular customers who buys all his goods from us. We asked a very good friend of ours to get us a case from one of the largest jobbers here, and he did so, bringing back the bill which showed he had paid \$3.40 less 20 cents less 2 per cent. Thus you will see that the retailers are still buying their goods at less than your list price.

"Do you not think it would be for the best interests of your concern to get together with us, and have our assistance in the distributing of Old Dutch Cleanser and your other products."

To this letter the defendant apparently made no reply.

On March 12, 1915, Mr. Frey wrote the defendant: "Enclosed kindly find our check for 50 cases of Old Dutch Cleanser at \$3.00 per case less 2% cash discount which we wish you would kindly send us at once." To this letter the defendant replied on March 16, 1915: "We return herewith your check for \$147, which you sent us with your letter of the 12th, to cover your order for 50 cases Old Dutch Cleanser. The price is incorrect, in accordance with our previous advices. If you will remit us at the rate of \$3.20 per case, less 2% cash discount, your order will receive our prompt attention" (61).

On April 19, 1915, Mr. Frey circulated a catalogue announcing:

"THE BIG FIGHT WILL SOON BEGIN.

*** * * THE CUDAHY PACKING CO.,** manufacturers of OLD DUTCH CLEANSER, and the WELCH GRAPE JUICE CO., manufacturers of WELCH GRAPE JUICE, have both been refusing to supply us with goods, because we don't sell at the prices set by them.

"We have placed the matter in the hands of our ATTORNEYS and SUIT WILL BE INSTITUTED IN THE UNITED STATES COURT within a short time to decide this question.

"WE ARE FIGHTING YOUR BATTLES for lower prices.

"If we win, you gain more than we do. If we lose, we have heavy Court expenses to pay. But we are willing to make the fight for you.

"Now show us that you want us to do it by giving us your support.

"SEND US YOUR ORDERS.

"That is the most positive proof that our action meets with your approval" (110-111).

A few days later, just before the plaintiff commenced this action, Mr. Frey published in the *Journal of Commerce* an article in similar vein, which was excluded from evidence over the defendant's objection and exception (97-107).

Over the defendant's objections and exceptions (63-76), Mr. Frey testified that on February 6, 1914, he wrote, in a form letter, to the list of wholesale grocers in Newport News, Norfolk, Portsmouth and Richmond, as follows: "Can you supply me with some Old Dutch Cleanser? I will send you my personal check with order for same, made out

in whatever way desired so that there need be no record of the transaction" (67); that on February 20, 1914, he wrote in another form letter, as follows: "We are having a little disagreement with the Cudahy Packing Company, manufacturers of Old Dutch Cleanser. Can you supply us with any of these goods? If so please advise us what you can ship us and what you will charge for it and I will send you a check to cover" (71-72); that "I succeeded in getting one lot of ten cases from S. W. Holt & Company, and could not get any more from anybody" (69, see also 72-73); that for this lot Mr. Frey paid \$3.10 per case which, with freight added, made the cost to plaintiff in Baltimore \$3.18 or \$3.20 per case (69-70, 132); that he made only one attempt to buy Old Dutch Cleanser from wholesale grocers in Baltimore, and being quoted the General Sales List price, he bought none until October, 1916 (73-74), which was after the commencement of this action (1); and that he had made no other attempts to buy Old Dutch Cleanser (76-132). Meanwhile, however, on February 25, 1914, while Mr. Frey's letters above mentioned were out and in the hands of these wholesale grocers (134), Mr. Frey had issued the public statement above quoted in which the defendant's attitude was ascribed to "the jealousy of the high-priced jobbers who try to have us cut off whenever possible" and the retailer was told that "this house is his greatest friend. * * * Why do you play in the hands of our competitors. * * * Remember that if it weren't for Frey you would pay much more for your goods than you do" (109).

Mr. Frey admits that, between February 2, 1914, and the commencement of this action, the plaintiff

bought no Old Dutch Cleanser from the defendant (63) nor from any one else except the ten cases from Holt above mentioned, although in all the catalogues which the plaintiff has printed and published every month since February, 1914, the plaintiff has continued to advertise and offer Old Dutch Cleanser at \$3.40 per box just as if it had it in stock (110, 111, 123, 154, 155) and ever since February 3, 1914, the defendant has always offered to sell the plaintiff Old Dutch Cleanser at \$3.20 less 2% discount leaving the net price \$3.14 per box in the quantities which the plaintiff always ordered (96, 125).

Mr. Frey testified, on direct examination (85-86), that the plaintiff in 1911 bought from the defendant 1,750 cases of Old Dutch Cleanser, costing the plaintiff \$2.95 per case, less 2%; that "barring the ones that we cut the prices on we sold them for \$3.40. I cannot answer exactly how many we cut prices on in 1911. There were less than five people that Mr. Swift told me about at the time to whom he gave a special price on Old Dutch Cleanser" (86); that "very few of the retail trade take their cash discount"; that there were "but few of those cases (of cut price). * * * Mr. Swift told me at the time I investigated it that the best price he had ever given on it was \$3.15" (86); that the plaintiff in 1912 bought from the defendant 3,450 cases, costing the plaintiff \$2.95 per case "except two lots of seven hundred cases, separate carload shipments, which cost \$2.92½ a case, each subject to the cash discount of two per cent." (86). When asked whether any were sold at cut price, Mr. Frey said: "I cannot answer that of my personal knowledge. That was the result of my report

from Swift only; there were less than five people to whom we gave a special price" (87). "In 1913," continued Mr. Frey, "we bought 1,753 cases. That was a year after the change, when there was a drop in the business. They all cost me \$2.95 a case, except three cases, that was a drop shipment and that cost me three dollars a case. * * * All that was two per cent. off for cash. The total volume of our business, in 1912 and 1913, dropped very heavily. I do not know of any special explanation of it, except that we got two big shipments in November and December of 1912, which carried us over until February, 1913, and it was the first year of the change and I did not push the business very hard. I mean a change in our own internal arrangements. I was kind of letting things go a little easy for a year. In 1914 I got ten cases from Holt, but from the Cudahy people none. Of the 1,753 cases I cannot tell you how many the prices were cut on. The Philadelphia shipment was a shipment in the latter part of 1912 that I made to B. S. Janney of 100 cases on which the price was cut, the price being three dollars f. o. b. Baltimore (87). * * * I do not think we ever sold 25 cases to one man. * * * I do not think we would sell more than one or two five-case lots in a year, if we sold that many. The biggest sale we sold was the three cases shown on this memorandum, and that was to a very large retailer" (93).

On cross examination, however, Mr. Frey admitted that ever since February, 1914, the plaintiff had been publicly proclaiming its stand for lower prices to the trade than those named in the General Sales List. Thus, on February 25, 1914, Mr. Frey circulated this public statement: "We are glad to

fight for lower prices for the retailer. We have just been notified by Cudahy Packing Company that they will not sell us at regular jobbers' prices. They make Old Dutch Cleanser. * * * We welcome all the fights they want to bring. The retailer is realizing more and more that this house is his greatest friend. * * * and remember that if it weren't for Frey you would pay much more for your goods than you do" (109). Again, on April 19, 1915, Mr. Frey circulated a catalogue announcing: "THE BIG FIGHT WILL SOON BEGIN * * * Cannot the jobber who is enabled to do business at a lower cost than his competitors by reason of his ability to systematize his business, save heavy expenses, avoid bad debts, and in numerous other ways which are OUR SECRET, offer his goods to his trade at a correspondingly LOWER PRICE than his competitor? We believe he should. THE CUDAHY PACKING CO., manufacturers of OLD DUTCH CLEANSER, and the WELCH GRAPE JUICE CO., manufacturers of WELCH GRAPE JUICE, have both been refusing to supply us with goods, because we don't sell at the prices set by them. * * * WE ARE FIGHTING YOUR BATTLES for lower prices" (110-111). Just before commencing this action the plaintiff published in the Journal of Commerce the article before referred to (97-107). On June 5, 1915, the plaintiff circulated a price card stating: "You know the legal fight for low prices has begun. We have entered suits against the Old Dutch Cleanser people and the Welch Grape Juice Company, to see if they have the right to make us charge you more for goods than we want to, and refuse to supply us if we refuse to overcharge you. The re-

tail grocer who pays \$3.40, less two per cent., for Old Dutch Cleanser when he hauls it himself and pays cash for it is being greatly overcharged. How we wish we could make that much profit on our goods. We would not stay in business but a few years, for we would be rich by that time. And the same thing applies to grape juice when you pay the price you do for it. This is your fight. If we win you will reap the greatest benefit from it. If we lose, Heaven help you, for then the manufacturers of branded articles will put the screws down hard. But we don't think we can lose. We believe we are right and that the law is on our side. We are going to heavy expense to make the fight for you and have the courts decide if we can sell you at the prices you ought to buy at. We want your support and we feel confident we are going to get it. If you want to know more about these cases, come down and talk them over" (119). Moreover, in the routine of the plaintiff's business, as described on cross examination by Mr. Frey, sales of Old Dutch Cleanser at less than \$3.40 may almost have been the rule. Instances of such sales below \$3.40 prior to February 3, 1914, have already been mentioned (50, 51, 94, 95). "In the keeping of our accounts with our customers," said Mr. Frey, "when we want to give him a rebate on any price of those goods, if it is an article where the manufacturer wants us to bill it at the list price, and does not care whether you rebate on it or not, we would bill it at the list price, whatever it is, \$6, say, and then at the bottom of the bill we put 'old credit due,' or 'allowance,' or something like that, whichever it was—I think the words 'old credit due' is the word generally used. * * * We give 'old

credits' on quite a number of articles in the business. * * * When the purchaser buys his goods he usually wants to know what that 'old credit' amounts to, and he is told right then. * * * Mr. Swift would give special prices to some of the larger trade. Those special prices were not put on the bill by the bill clerk. He would make the allowance, regular allowance, and Mr. Swift would make a special allowance, and in other cases the bill clerk would not put them on, and Mr. Swift would make them all in other cases, and that would be about the only two ways, one or the other. * * * We started using that phrase in our business away back. I could not tell you when it began, longer than five or six or seven years ago, and we have used it ever since, right up until to-day, and are using it today. Whenever we sell a bill of goods that we want to give a credit on and do not want to show it is a rebate, we run in the word, 'old credit.' That is the practice in the City department. In the out-of-town department we do like other jobbers do, and mark on the face of the invoice an 'allowance' or 'credit,' 8 cents or 10 cents or 20 cents, or whatever it is. That would be an allowance on the price, the same as the rebate. * * * On bills or orders that included any of that Old Dutch I could not tell whether we ran in any of this old credit" (150-153). No computation can be made of these allowances, because, to quote Mr. Frey: "We do not carry in our books an account of 'old credits' in which 'credits' on all this is run in. * * * We keep no record of this whatever" (151-153).

That Mr. Frey's testimony on direct examination regarding the price at which the plaintiff sold

Old Dutch Cleanser was wholly hearsay appears not only from his direct examination above quoted, but also from his statement upon cross examination: "I do not make the bills out myself. I have to speak now of what the general instructions were. . . . As a practical matter, most of the sales made by my concern are not made by me personally, but by some of my clerks, of course. There are thousands of those sales. Of course I do not pretend to check up every one of these bills" (161). Exhibits which were later offered by the defendant and received in evidence conclusively show that hundreds of orders were, in fact, accepted by the plaintiff for Old Dutch Cleanser at less than \$3.40 per box and even as low as \$3.20 and \$3.30 per box (160, 291-295, 302-305).

Over the defendant's objections and exceptions (76-84), Mr. Frey, without referring to the plaintiff's books of account, testified that the plaintiff's total volume of business was "about \$1,300,000" in 1911; "about \$1,400,000" in 1912; "a little less than \$1,200,000" in 1913; "nearly \$1,600,000" in 1914; "approximately \$1,700,000" in 1915; and "over \$1,800,000" in 1916 (79-80); that during these years the plaintiff's "average cost of carrying on business" was "about 6½ per cent." (80), and specifically was "about 4½ per cent. to 5 per cent." in 1912; "about a little over 5 per cent." in 1913; "a little under 5 per cent." in 1914 and 1915; and "a little over 5 per cent." in 1916 (82-83); that the plaintiff's "gross profit" was "over six per cent." in 1914; "a little under nine per cent." in 1915; and "between eight and nine per cent." in 1915 and 1916 (83); that the plaintiff's "net profit ranged from something over one per cent.

to * * * a little over four per cent. last year, or just about four per cent." (83-84).

Over the defendant's objections and exceptions Mr. Frey testified (88-89) that the plaintiff's "total expense of doing business" was \$60,326.42 from November 4, 1912, to November 4, 1913; \$67,459.82 in 1913-1914; \$70,977.78 in 1914-1915; \$74,616.02 in 1915-1916; but that the plaintiff "could have sold all the Old Dutch Cleanser in 1912 and 1913 without adding a cent to this cost of doing business, because the amount was too small, it would have just been absorbed in the whole" (88). On cross examination, however, Mr. Frey testified that in estimating his cost of doing business he did not include "interest on our capital investment" (149), and did "not keep any books showing a separate cost of my City Department as distinguished from my out-of-town department," although the former ran "considerably higher" than the latter (150).

The plaintiff's Old Dutch Cleanser business, according to Mr. Frey, "was very, very small, compared with (plaintiff's) total business"; according to the trial judge's calculations "a little less than one-half of one per cent." (88).

On cross examination Mr. Frey admitted (123) that between \$3.20 per case, which, less two per cent. for cash, leaves less than \$3.14 per case, was the price which the defendant always quoted to the plaintiff after February 3, 1914, and \$3.40 per case, which, according to Mr. Frey, was the price "we were accustomed at that time to sell" (123), there was a profit of *twenty cents*, or, with discount added, a profit of nearly *twenty-seven cents*. This twenty cents profit, figured in percentage, amounts to a profit of six per cent.; and this

twenty-seven cents profit, figured in percentage, amounts to a profit of nearly nine per cent. These percentages of profit contrast significantly with the plaintiff's "gross profits" of "over six per cent." in 1914, "a little under nine per cent. in 1915," and "between eight and nine per cent." in 1915 and 1916 on the plaintiff's total volume of business (83). If we are to believe Mr. Frey's contention, then his margin on Old Dutch Cleanser was all net profit because the plaintiff "could have sold all the Old Dutch Cleanser in 1912 or 1913 without adding a cent to his cost of doing business." Even under these circumstances, however, the plaintiff could have made at all times subsequent to February 3, 1914, net profits of from six per cent. to nine per cent. on Old Dutch Cleanser bought at the figure which the defendant continually quoted the plaintiff, which net profit would have contrasted favorably with the plaintiff's "net profit" ranging "from something over one per cent. to * * * four per cent." on its total volume of business (83-84).

"We have to average up our prices," said Mr. Frey, when his attention was directed to these figures (124), "I would not have bought it from Cudahy at \$3.20 a case because I could not afford to sell it in my business, buying at that cost. My prices have to be figured as an average. I have to make a long profit on lots of things like Dutch Cleanser and certain other goods, to be able to make an average profit on my whole line, because so much stuff has to be sold at cost in our business" (132). "We have to get as much as we can on such goods as are heavily advertised, where the people are willing to pay full prices simply be-

cause they want it because it is advertised to them, like Old Dutch Cleanser, for instance, we have to get the full profit on a lot of those items to bring our average profit to a legitimate basis to continue in business, on account of so many goods having to be sold at no profit, and a great many articles in our business we handle, I believe, at really a loss and you have to strike your average profit from your speculative buying, and by your getting the best price on a number of things where the trade are perfectly willing to pay it, and that sort of thing. Now, I can judge my average. I am always able to keep track of whether my average is working right by the close system I have in the business. I can see Thursday night, for instance, what the results of the last weeks' entire operations were. Well, I can tell right away whether I have to lower the cost of some things and where things have got to be raised, or where they are too high. I do not like to lower them. For illustration, on Old Dutch, you can get \$3.10, and on Kirkman's I will have to sell that at maybe a 2 or 3 per cent. profit. I have to charge what the traffic will bear and bring me the business, owing to my peculiar method of doing business. I have to offer inducements in the City Department to get people there * * * I cannot take some arbitrary figure and say, 'I will get a single rate of per centage on every one of my items.' I cannot do business that way. I wish I could. These answers that I have given you, in respect to the way in which I conduct my business apply for all these years, from February, 1914, February 3, 1914, up to the present time" (156-157).

During this period, nevertheless, the plaintiff was advertising:

"We sell you at Cost and only add one per cent. for our profit.

"A salesman selling on commission gets two per cent., so when we only ask one per cent. for our compensation, you see how close we work. * * * Look at the prices quoted in this catalogue.

"These prices are cost prices and you add one per cent. to them to see just what the goods will cost you. * * *

"You make out your order, figure up the amount, add one per cent. to it and enclose your check with the order.

"Your bill will be sent to you showing the amount of your shipment, the amount received from you and the balance, if any, to your credit, or it will show if there is any balance due us. * * *

"On a few of these we cannot give a better price, but on almost all of them we give you a big rebate which shows on your invoice and is called "Special Credit." You will make your biggest saving in these Special Credits" (158-159).

Over the defendant's motion to strike out and exception (91-92), Mr. Frey testified: "Down to the time of the filing of the suit, we were having continued demands for Old Dutch Cleanser from our customers * * *. I could not give you an idea of the quantity; all the salesmen in the place were constantly after me to try to get it for them. We were losing trade and could not fill orders" (91).

Elsewhere Mr. Frey testified: "I have none of the actual orders for Old Dutch Cleanser that we received subsequent to February 3, 1914. We did not keep them that long. * * * We ship too many orders a day out of the out of town department to keep all that stuff. They will be kept around there until the space for which we have reserved for that purpose gets filled up, and if we have no other place to keep them, you know, and there would be no object in keeping them—we simply bale them. We usually go through the ledger before we do that, to see if there is any one particular order that we want out of it, that we might be called on to sue a fellow, and have to prove the shipment, and take the shipping order, and the order sheet, and the bill of lading, but the rest of them are baled up and sold for baled paper" (147). Mr. Wilcox, the plaintiff's bookkeeper, testified that between the fall of 1912 and May, 1915, "we received numerous orders for Old Dutch Cleanser. We received them by the mails. We have those letters ordering them in our files, that is some of them. We keep our letters about four years. * * * Some of them have been destroyed after three years" (289). Over the defendant's objection and exception, Mr. Hammen, manager since the latter part of 1915 of the plaintiff's City Department, testified: "We have had quite a large demand for Old Dutch Cleanser. It was one of the most popular sellers we had. There was no reason why we would not have a large demand for it. I do not know just what the size of the demands were; I don't remember that any more, but we still have demands up to the present date for it" (280); that between

January 1, 1914 and May, 1915, the calls for Old Dutch Cleanser were "considerable" (281-282). Over the defendant's objection and exception, Mr. Bertram, the plaintiff's city salesman, testified that from February, 1914, to May, 1915, "I had lots of requests from customers for Old Dutch Cleanser; I did not take any orders. By lots of requests, I mean on an average of about ten or fifteen a week * * *" but later "not as much as the first, because the people got on to it that we did not have it" (282-283). On cross examination, however, Mr. Bertram testified that to give "an approximation" of the orders he received for Old Dutch Cleanser "would be impossible. I cannot say definitely how many there were a week. The majority of them were for a case. We sold in less than case lots, in two-dozen and one-dozen; but I have no idea as to how many cases that would make" (283).

Over the defendant's objection and exception (176-204), Mr. Thomas, a wholesale grocer in York, Pennsylvania, testified that at some time not specified, Mr. Frey tried to buy Old Dutch Cleanser from Mr. Thomas (176-177); that Mr. Thomas did not sell Mr. Frey any (177); that in January, 1912, *over two years before any of the transactions in the present action*, Mr. Thomas received from the defendant a "form of application for jobbing terms and declaration as to late business on Old Dutch Cleanser" which he never signed (179-186); that the defendant "had a representative in Harrisburg that covered that whole territory through there in canvassing for business" (186); that this representative complained that he could not get business in the same town where Mr. Thomas had been selling Old Dutch Cleanser and "he surmised

that I had cut the prices on the goods because he did not procure the sales" (186); that some conferences and correspondence followed between Mr. Thomas and the defendant in the months of January and March, 1912, in which price cutting was mentioned (186-191); that continuously since then the defendant has quoted Mr. Thomas at the General Sales List price (188, 192-197), but that, as Mr. Thomas expressed it, "I did not avail myself of the prices" (194).

Over the defendant's objection and exception, Mr. Sonnehill, employed by the defendant as a "missionary man" from January 1, 1910, to September 1, 1913 (182, 255, 260, 268), *more than five months before any of the transactions in the present action*, testified that during his period of employment "we had a few jobbers here that were not on the list, they either could not buy the quantity or for credit reasons and that was for the Cudahy Packing Company to decide, and not me" (265); that "occasionally one would be taken off because his credit might be good (bad?) and then one might have a warning against him C. O. D., and so on" (252); that in March, 1913, *nearly a year before any of the transactions in the present action*, the defendant testified Mr. Sonnehill not to call upon the plaintiff (206-208); that nevertheless "Mr. Frey always bought Old Dutch Cleanser during my administration. Mr. Frey never knew that he was cut off. * * * I don't know that I have any right to classify that he was cut off the list at that time. I simply stopped taking missionary orders for him and told him at that time—at least I didn't tell him anything, but I was cut off from taking missionary orders and was instructed not to go to see Mr. Frey (226).

* * * They must have rescinded it or modified it after I was instructed; I don't know how I was instructed, but I continued then to call on Frey. Frey knew nothing about that at all (255). * * * It was not very long after I received from the Cudahy Company in March instructions not to call upon Frey that I again resumed calling upon Frey and giving him orders, or taking orders from him. I couldn't say the time. If it had been any length of time, Frey would have applied for goods. It was such a short time that Frey did not know about it at all" (256); that Mr. Sonnehill often discussed with the defendant's manager the jobbers in Baltimore whom the defendant had not selected as distributors; that "the purport of the discussion was that perhaps they were a little weak in credit, perhaps it was a question as to what quantity they could buy, and they canvassed a section where a ten-cent proposition was pretty hard to sell" (226-227); that some time before June 26, 1913, *more than seven months before any of the transactions in this action*, the defendant's manager conferred in Baltimore with Mr. Sonnehill and interviewed Mr. Frey regarding the latter's price-cutting (208-211, 223-226); that under date of April 6, 1912, *nearly two years before any of the transactions in the present action* the defendant issued the following circular:

"To our General Representatives:

"O. D. C. PRICE LISTS contain full and exact particulars as to our price provisions, marketing plan and sales regulations.

"JOBBERs are those dealers whom we carry on our preferred list of customers, and it is

only to such that we sell at prices and under the conditions shown in our special *Jobbers' Price List*. We recognize in this class only those wholesale distributors who have no retail affiliations.

"VIOLATION: Where a preferred (or jobbing) customer violates our marketing plan or price provisions, it is our policy to discontinue him from our list of preferred customers.

"We put on each Jobber's invoice a stamp reading as follows 'On all your resales of the Old Dutch Cleanser covered by this invoice, to either retailer or jobber, please observe our regular retailer's cost prices, in accordance with our published list.

"Our O. D. C. marketing plan, through jobbing medium rests on mutual confidence, respect and co-operation and we look to the principle in control of each jobbing house for the carrying out of our policy within its ranks.

"Our general representatives are requested to make our policy clear to our customers at every available opportunity, to ask their support and gain their appreciation for the following important reasons:

"'Old Dutch' is the original, the standard and the recognized seller in that line.

"It is continuously advertised on an important and National scale. It is marketed through exclusive jobbing channels. To maintain a uniform price is the only way to insure the jobber a fair and reasonable profit, and we will spend our time and money freely in support of this policy.

"We canvass the retail trade through a large and well organized force of specialty salesmen.

"We treat our customers with uniform consideration, courtesy and equality, making no exceptions and extending no special favors to any class of trade or to any special territory.

"We ask of our general representatives a careful consideration of the above facts, feeling sure that their proper understanding and steady promotion of same will secure for us the good will and appreciation of the wholesale trade and its support in the sale and further distribution of Old Dutch Cleanser.
4/6/12.

"Maintenance of Price Schedule.

"It is our policy in marketing Old Dutch Cleanser and Dutch Hand Soap to wholesale grocers to maintain a uniform selling list (as published) to the trade. List shall be observed absolutely by all of our connections and by jobbers and distributors handling our goods, without exception.

"All jobbers of our Old Dutch Cleanser and Dutch Hand Soap have been properly notified, form of which notice is shown on the other side of this sheet.

"It is needless for us to say that our sales connections must not cut price on these products, nor countenance price cutting on the part of jobbers or their salesmen, directly or indirectly, and any case of infringement of our limitations as to retail selling price should be promptly reported with all possible particulars as to date of order, date of shipment, name of merchant, location, number of boxes, &c.

"Our salesmen, so far as it comes within their province shall make it clear to jobbers and their salesmen that it is our purpose to carefully and effectively enforce our policy by all proper and legitimate means within our power. * * *

"The following is form of notice issued:

"To jobbers:

"Old Dutch Cleanser and Dutch Hand Soap.

"We take this means of notifying you—as well as other jobbers—that it is our purpose to maintain a uniform selling basis from all jobbers to the trade (both retail and jobbing) in accordance with our published price list on Old Dutch Cleanser and Dutch Hand Soap, as per copies herewith.

"These goods, which bear our exclusive trademark, are widely and prominently advertised and known, which has established for them a certain fixed position and value.

"It is our purpose to admit only those jobbers who fully maintain these prices to the privilege of direct buying from us at full jobbers' discounts, and to such jobbers only we will give the benefit of the assistance of our specialty selling force.

"Kindly arrange it so that your salesmen or employees will thoroughly understand these price limitations, and that no business, directly or indirectly will be done in violation thereof.

"We want to emphasize the fact that the interchange of stock, or the sale of Old Dutch Cleanser by one jobber to another, must be at full retail list only.

"We expect by the enforcement of the above conclusions to gain a practical benefit in increased business, both to you and ourselves on these products, and hope to merit the support and appreciation of your company and other jobbing trade.

that "I don't know what became of these various lists that came with the price list. I did not keep an account of every list that came down. There might have been one that came that superceeded that; I don't remember. * * * Yes, it might possibly have been"; that Mr. Lorton, who was employed by the defendant in 1901 "maybe a year or more," nearly thirteen years before any of the transactions in this action, would "tell the jobber very often in my presence that it was necessary to maintain prices, that the field could not be kept in a healthy condition unless the price was maintained. * * * The jobber in these conversations would answer along the lines that he appreciated that in order to get a profit out of it that he would maintain the prices, that there was no question on that score at all"; that "Mr. Lorton came down and I heard him discuss with the jobber the question as to what prices that man was selling Old Dutch Cleanser for, and the jobber told him that there need not be any question on that score, that he, the jobber, would not make any profit unless he sold it at the long price of \$3.40 per case. In a number of instances that was the drift of the conversation. And when Mr. Lorton put the matter up to the jobber, the jobber said, 'You need not pay any attention to it, I, of course, sell at \$3.40 because I would not get the profit if I did not'; that is what he said";

that Mr. Sonnehill did not "think I had occasion to go to see any of the jobbers and talk with them about the question of price cutting. • • • I never reported anybody from mere hearsay; if I had no evidence I would not report it. So I never reported anybody" (229); that Mr. Sonnehill "never found any evidence in Baltimore of any cutting of price by any of the Cudahy distributing agents handling Old Dutch Cleanser during all the times that I was with the Company, to my best knowledge and belief, so that on that point I never had occasion to report anything to anybody. I cannot remember now whether I ever had any discussions with any of the jobbers on that subject. • • • I was never troubled with price cutting down here. • • • That is what I found in all the three years that I was here" (252-253); that Mr. Sonnehill solicited from retailers and turned over to the plaintiff hundreds of orders for Old Dutch Cleanser which the plaintiff accepted (268-271, 291-306); that "I don't remember that I was ever requested by Mr. Frey to investigate any orders which I turned in which I had received from retailers for the purpose of seeing why any retailer may have rejected the order and refused to take it" (270); that, by admission of the plaintiff's counsel, "there is no evidence that Mr. Frey made any complaint about any of them" (305); that the defendant's instruction: "If you are selling a retailer and he should ask you to book the order through a jobber who is not on your list, you will simply state, I am unable to accept the order for their account, please name another jobber. If the retailer does not wish to name a jobber on our distributing agent's list, you will merely say, I am sorry, but I am unable to

accept the order" (274) was construed by Mr. Sonnehill, "possibly misconstrued" as Mr. Sonnehill admits, as an instruction to "switch" orders (274-277); that after a difference with his superior in the defendant's organization, Mr. Sonnehill was told it was best for him to resign "and I resigned" (255); that "six months or a year" before the trial of this action, Mr. Sonnehill "gave Mr. Frey some price lists. . . . I was very glad to give them to him. . . . The first thing when I saw there was a chance to give something to Frey to help him in a case against the Cudahy people it was natural for me to comply" (262-263); that Mr. Sonnehill also furnished Mr. Frey with other information and correspondence bearing upon this case (265); that the plaintiff "is a very large wholesaler" (268) and now "buys a fair amount of merchandise" from the concern with which Mr. Sonnehill is now connected (267).

Mr. Reiter, a wholesale grocer in Baltimore, testified that he sold Old Dutch Cleanser at General Sales List prices; that "we take that price from Cudahy price list as he sends them to us. . . . In selling the Old Dutch Cleanser which we had bought, we adhered to the prices stated in those lists with a few exceptions. Whether those few instances in which we cut the prices were done with the knowledge of the Cudahy Packing Company I don't know. I have an idea that they found it out (284). . . . Around that time I had one of their salesmen approach me and state definitely what their policy had always been. That was as far as I got. Had I known that policy at the time I would not have cut Old Dutch Cleanser. . . . He said nothing about what the consequences would

be if we did not take that advice. • • • I think that several of our salesmen are rebating on Dutch Cleanser. I have never seen myself a definite case of that but I have heard them speak of it. That conversation I have related was with Mr. Conway. What year it was I wouldn't want to say (285). • • • I certainly regard myself as absolutely free to sell that Old Dutch Cleanser at any price I choose. • • • We need a suitable profit and we take it" (286); that "one of the reasons" why Mr. Reiter sells Old Dutch Cleanser at \$3.40 is because he wants "to get the profit. • • • The other reason is that I feel that Cudahy & Company would not publish a price list maintaining or requesting us to maintain a price unless they felt it was good for the policy of their concern and for everybody concerned, and for the reason I observe that for the good of my fellow jobbers" (287); that he also feels that it is good for him as well as for them (287); that "there has never been any contract entered into between us and the Cudahy Packing Company as to the price at which we should sell Old Dutch Cleanser nor any agreement of any kind at all as to price, any agreement by which we obligated ourselves that we would sell at a certain price" (288); that after Mr. Reiter's conversation with the defendant's representative above mentioned, Mr. Reiter did not feel "honor free to cut the price," by which, as he explained, "I considered it fair to ourselves and to the Cudahy Company and distributing agents everywhere to sell at the price, that is why we sold it at that price. That states the whole of our understanding. • • • I knew that it was the wish of the Cudahy Packing Company that the jobbers should not sell

at less than that price which had been fixed by the Cudahy Packing Company. I adhered to it. I could not tell whether the other jobbers around Baltimore did the same thing. I don't know among the grocery trade what my competitors are doing" (288).

Mr. Edgerton, a wholesale grocer in Baltimore, testified: "We never had any contract with the Cudahy Packing Company in respect of the price at which we shall resell Old Dutch Cleanser. . . . I do not know whether we feel free to sell that class of goods at any price we wish. We handle a large number of similar goods that are billed to us at the factory's price and we are supposed to sell at the resale price understood or established by the factory . . . all manufactured goods of that sort, we are supposed to sell at the resell price. I do not think we have got any contract on any of those goods. . . . we feel that we are under a moral obligation. We do not cut the price, because it would be bad business policy for us to do so. It would be bad business policy, because it would simply cause our competitors to meet our cut price and probably go us one better . . . we would lose our profit by cutting the price . . . we want the profit. That is our primary object in being in business. We want a profit that we can legitimately get without being accused of overcharging . . . it is not the only reason. . . . The other reasons are that it would be bad business policy, as I stated before, to start a cut rate campaign on the goods, on which prices have been made by the manufacturer . . . on the goods of that sort it is so hard to get a profit on many goods that we do handle, that when it comes to an article like Old Dutch Cleanser,

Proctor & Gamble's soap, and hundreds of other articles of that sort that I might mention, we simply maintain the resale price, large or small order, it don't make any difference. * * * I do not think the Cudahy Packing Company ever asked us to maintain the price. I do not think they say in the circulars they want us to * * * on goods of the character of Dutch Cleansers I should think that other jobbers would have a perfect right to complain to the manufacturer if we did cut the price. That is not because we would not be selling it according to the instructions of the Cudahy Packing Company. I cannot find that we have had any instructions from the Cudahy Packing Company. I do not remember that we have had any instructions from them as to that. * * * I do not know that they have ever asked us to do it or not, to cut it or not to cut it. We know that is the price that everybody sells it at. That all men sell it at that price, and we will sell it at the same price" (310-313).

Mr. Schwab, a wholesale grocer in Baltimore, testified: "We have no contract with the Cudahy Packing Company as to the price at which we would sell Old Dutch Cleanser. We did not in 1914, '15 or '16 have any such contract, nor any agreement at all * * * we never had any agreement of any kind. We felt free to sell the goods at any price we want. * * * We sold it any price we saw fit. That was a little different from the list price. We cut the price on it * * * we sold it in the quantities different. I do not know that we ever sold it below \$3.20 but we have sometimes sold 10 cases at \$3.20, or five cases. * * * I did not think I was doing wrong * * * we do feel a little obligation to them * * * because they do a great deal of

missionary work, and they try to protect the jobber in that way by giving him a legitimate profit, and for that reason we think we should keep as near the price they give as we can" (314-315). When asked if he did not know that, if the defendant found out that he was cutting the price, the defendant would cut him off, Mr. Schwab replied: "I do not know whether they would or not. . . . There was nothing at all said by them. If I ordered Old Dutch Cleanser, I get it. I don't know whether any complaint was made of me by anybody I know of to the Cudahy Packing Company that I was cutting the price. When I bill it out I bill it out at the cut price. . . . I told you before we try to adhere to that list, in about 95 or 98 per cent. of our sales, on account of the support that they give us . . . when we get a price, why, we generally do adhere to it, very nearly all the time. In a few instances we do not. . . . I guess there are some others that cut prices the same way" (315-317).

Mr. Drury, a wholesale grocer in Baltimore, testified: "I do not recall whether we had any contract with the Cudahy Packing Company at that price. We did not have any agreement of any kind. . . . We felt free to sell it. . . . I do not know that the Cudahy people fix the price at which we sell to the retailer Old Dutch Cleanser. They suggest a price, yes. They do not tell us to sell at that price. That is not part of their system. I have seen lots of their literature. I cannot recall that I have seen any of their literature where you cannot sell at any other price except as stated by them. I have seen all the literature in respect to that in their jobbers sheets. I do not know that they ex-

jest me to maintain the price. I expect they want us to, yes, and we do maintain the price. We do sell it at \$3.40. I suppose you call that maintaining the price. * * * Our object in selling at \$3.40 is to make a profit, of course. * * * There are no others (motives) that I know of. * * * If we were to cut a price we would naturally feel that a competitor would meet us, and it would result in no profit for any of us. * * * If Cudahy & Company would fix the retail price at \$3.50, I do not know whether we would or not sell it at \$3.50. Very naturally we would want all the profit we could make out of it. I said that I thought it would be unfair to the wholesalers. I mean that the wholesalers would meet any cut that I would make, perhaps. I was selling at the same price that the other wholesalers were, as far as I knew. I do not know whether Cudahy Packing Company would fix that price or not. I do not recall that he put in the circular that we were to sell one case at \$3.40. We got the price of \$3.40 from his selling agent. The agent did not tell us to sell at \$3.40. He said that was the sale price for it. * * * Most manufacturers fix the sale price. * * * I say to you that most of them do fix it. They suggest the price. * * * If we were to sell less than \$3.04, then our competitors would naturally meet our profit. * * * That would be unfair to ourselves. * * * When we bought the goods we sold the goods, and we thought that was the only fair price" (321-324).

Mr. Snow, a wholesale grocer in Baltimore, testified that there was no agreement or contract between him and the defendant regarding the price at which he should sell Old Dutch Cleanser (324).

He further testified that he did not feel "absolutely free" to sell Old Dutch Cleanser at any price, because "in a grocery store on a regular market, the profit is so very small that if a man cuts a very little bit he cuts all his profit out and when a manufacturer is fair enough to try to give a wholesale grocer a little bit of profit, we feel really bound that we ought to try and maintain his price and we do. * * * Most of the manufacturers give us a price to pay for the goods for ourselves, and a price to sell them at, which they think is a fair margin of profit, some more and some less" (325). The trial judge then put this question to Mr. Snow: "Mr. Snow, if you stand by the manufacturer in the sense of doing what he asks you to do, what do you expect him to do to you? In other words, if you sell at 3.40, and somebody around the corner in the same line of business is selling it for 3.30, what do you expect the manufacturer to do to you? If he asks you to sell at 3.40, or advise you to sell it at that price, whatever you chose to call it, and you do sell it at 3.40, and a competitor across the street, or around the corner is selling at 3.30, what do you expect the manufacturer to do?" (325). To this Mr. Snow replied: "I do not expect him to do anything. * * * We have people cutting all around us on different articles, and we maintain the full price. That is occurring all the time. * * * We are under no obligation to anybody to maintain the full price. When I buy things and pay for them, they are my goods, and I get what I feel like for them. * * * I feel we ought to protect any article of a manufacturer. * * * Sometimes we cannot do it. * * * There are no morals connected with it. It is simply a matter of business policy" (325-326).

Mr. Bankhardt, a wholesale grocer in Baltimore, testified: "We have no agreement or contract with the Cudahy Packing Company regarding prices. We have no agreement with them whatever. We did not have any in 1914. We did not at any time have any. We feel absolutely free in our company to sell at any price we wish. * * * They (the defendant) never said anything about it. * * * I do not know what they expect. You would have to ask them about that. * * * All manufacturers' goods have a jobbing price and a quantity price, and a jobber is supposed to get a reasonable profit for handling the goods, and in order to get that they must have a selling price to the retail grocer. * * * We buy our flour from Grafton, in carload lots, and put it out under our own brand. Sugar you can buy anywhere; and they are not manufacturers' articles. When you come down to the manufacturers' products, that is about 25 per cent. of the stuff, and about 75 per cent., is anybody else's goods, and sell at any price, buy at any price and sell at any price you wish. There is no restriction there. We do not consider it restriction, the price to the jobbers. * * * He has to protect his business by getting somebody to sell his goods, and that somebody expects some pay for handling the goods. * * * That price is not adhered to, by hardly any jobbers" (326-327).

Over the defendants' exceptions, the Court excluded proofs that in the Baltimore market Old Dutch Cleanser was subject to competition from Spotless Cleanser, Babbitt's Cleanser, Octagon Cleanser, Kirkman's Powder, Bon Ami, Sil San, Bestene and other brands of cleaning compounds aggregating in all thirty-two in number (127, 128, 137-141, 145-147, 287, 288); and also excluded the

deposition *de bene esse* of Mr. Strauss, the defendant's Old Dutch Cleanser Department manager (329-408) ; so that the jury never had any proofs in respect of any of the competitive conditions surrounding the marketing of cleaning compounds in general and Old Dutch Cleanser in particular, nor any proofs in respect of the defendant's method of marketing Old Dutch Cleanser, its use of its General Sales List, its selection of distributing agents as the mediums for supplying the retail trade and as the adjuncts to its own salaried force in the solicitation of the retail trade, nor any proofs in respect of the commercial and economic reasons on which the defendant relies for the proposition that its method of marketing Old Dutch Cleanser and its conduct towards the plaintiff, in view of the competition to which the defendant was subject from other cleansers and the competitive conditions surrounding the marketing of Old Dutch Cleanser in Baltimore and elsewhere, were reasonable and not unduly restrictive, or in restraint of trade, or monopolistic within the meaning of the anti-trust laws.

Since plaintiff has not yet served its brief upon defendant, defendant's counsel cannot comment upon plaintiff's counsel's discussion of the evidence, but the latter's discussion of the evidence in their brief in the Circuit Court of Appeals prompts defendant's counsel to warn this Court against two faults conspicuous throughout plaintiff's counsel's discussion of the evidence: First: Plaintiff's counsel's habit of quoting transactions which occurred, and circulars of the defendant which were superseded, from two to four years before any of the transactions between plaintiff and defendant

mentioned in the declaration (195, 272, 273, 307); and Second: Plaintiff's counsel's habit of quoting testimony, sometimes mere parts of a witness' answer, and drawing inferences therefrom, without quoting other parts of the same testimony, sometimes other parts of the same answer, which effectually contradict plaintiff's counsel's inferences. For this reason, defendant's counsel respectfully requests this Court to check against the record itself all of plaintiff's counsel's quotations on transactions, circulars and testimony, with a view to fixing the exact day of such conversations and circulars, and whether such circulars were superseded before the transactions between plaintiff and defendant mentioned in the declaration, and whether plaintiff's inferences from the testimony are contradicted by other parts of the testimony quoted by plaintiff's counsel.

Summary of Evidence.

Defendant did not enter into any "understanding or agreement" with any one regarding the prices at which Old Dutch Cleanser should be sold.

Defendant, without any such "agreement and understanding," simply assumed and performed for its Old Dutch Cleanser distributing agents, defendant's all-important function of creating the Old Dutch Cleanser consumer demand and soliciting retailers' orders for distributing agents' account; and defendant merely expressed to its Old Dutch Cleanser distributing agents its belief that uniformity of prices between such Old Dutch Cleanser distributing agents and defendant's own salaried force of Old Dutch Cleanser solicitors and "mission-

ary men," working alongside Old Dutch Cleanser's own selling organization, was desirable, and essential to protect defendant's good will in Old Dutch Cleanser, and essential to make effective defendant's sales promotion, advertising and solicitation of retailers for Old Dutch Cleanser distributing agent's account above described, and wholly in conformity with the anti-trust laws and with public policy.

Plaintiff, while conceding that defendant created the Old Dutch Cleanser consumer demand above described, disregarded the fact that defendant's Old Dutch Cleanser sales promotion and advertising and solicitation of retailers' orders for Old Dutch Cleanser distributing agents' account above described resulted in the creation of legitimate good will to the defendant, and exercised its free right of resale by reselling Old Dutch Cleanser in such manner and at such prices as were calculated to undo defendant's good will, sales promotion and solicitation of retailers' orders for Old Dutch Cleanser distributing agents' account above mentioned.

Defendant, without denying that plaintiff had free right to resell, in any manner and at any price plaintiff chose, Old Dutch Cleanser which plaintiff owned or might acquire, discontinued giving plaintiff the pecuniary compensation which it allowed to Old Dutch Cleanser distributing agents, and in effect ceased giving plaintiff the benefits of defendant's good will and gratuitous sales promotion, advertising and solicitation of retailers' order for plaintiff's account by defendant's own salaried force of Old Dutch Cleanser solicitors and "missionary men" working alongside plaintiff's own selling organization.

Defendant did not refuse to sell plaintiff Old Dutch Cleanser (notwithstanding plaintiff's assertion to the contrary); but defendant simply discontinued giving plaintiff the gratuitous benefits and the pecuniary compensation which it allowed to Old Dutch Cleanser distributors; and thereafter defendant always offered to sell plaintiff Old Dutch Cleanser at prices which permitted plaintiff, if it chose, by reselling it in the manner and for the resale prices testified to by Mr. Frey, to obtain a profit exceeding the average rate of profit upon plaintiff's entire business and exceeding the rate of profit mentioned in the calculation of damages suggested by the judge in his charge to the jury.

Only this question, therefore, is presented: When a dealer is engaged in conduct calculated to alienate all other dealers from handling the goods of a manufacturer and otherwise to injure such manufacturer, can such manufacturer, having no "understanding and agreement" with his dealers in respect of resale prices, and being under no obligation to sell to anybody, discontinue its gratuitous solicitation of retailers' orders for such dealer's account, and discontinue allowing such dealer special compensation, and simply sell such dealer at a price which, by such dealer's own admission yields such dealer a profit exceeding what he makes on his business as a whole, and exceeding the figure taken by the trial judge for his computation of damages in his charge to the jury?

Specification of Errors.

For reasons mentioned at the outset of this brief, defendant's counsel has not seen plaintiff's brief and therefore cannot comment upon the specifica-

tion of alleged errors relied upon by plaintiff further than to say that, even if the Circuit Court of Appeals erred (which defendant denies) in one or all such alleged errors, it nevertheless follows, for the reasons mentioned at the outset of this brief, that this court will examine defendant's Assignment of Errors in the District Court (459-543) and if this court finds therein any reversible error whatsoever this court will affirm the order of the Circuit Court of Appeals directing final judgment for defendant.

To enumerate these errors, all of which were assigned by defendant in its Assignment of Errors in the District Court (459-543) and which aggregate 141 in number, would unreasonably expand this already long brief with points which will become wholly immaterial if this court holds that the Circuit Court of Appeals did not err in any of the alleged errors assigned and specified by plaintiff. Defendant therefore has simply indicated, under the points below, groups of errors assigned by defendant in the District Court which defendant believes require this court to affirm the order of the Circuit Court of Appeals, even if that court erred in one or all of the alleged errors assigned and specified by the plaintiff herein. If, upon the argument, this court suggests that defendant otherwise specify and fully set forth these errors assigned by plaintiff in the District Court, plaintiff's counsel will ask leave to do so in a supplemental brief.

Analysis of Argument.

Defendant contends that

I. The Circuit Court of Appeals correctly held that there was no evidence tending to prove any "understanding and agreement," contract, combination or conspiracy in violation of the Sherman Act.

(a) No "understanding and agreement," contract, combination or conspiracy was proved.

(b) No "monopoly" was proved.

(c) No "refusal to sell" was proved.

(d) Even if a "refusal to sell" had been proved (which defendant denies), it could not, under the circumstances proved herein, constitute any violation of the Sherman Act or Clayton Act.

II. The Circuit Court of Appeals correctly held that there was no evidence tending to prove any "discrimination" in violation of the Clayton Act.

III. Even if there were any evidence tending to prove any unlawful "understanding and agreement," contract, combination, conspiracy or "discrimination" (which defendant denies), the Circuit Court of Appeals' order must be affirmed because the trial court erred in his charge to the jury relating thereto.

IV. Even if any "understanding and agreement," contract, combination or conspiracy in vio-

lation of the Sherman Act had been proved (which defendant denies), the Circuit Court of Appeals' order must be affirmed because the trial judge refused to grant a bill of particulars.

V. Even if any "discrimination" in violation of the Clayton Act had been proved (which defendant denies), the Circuit Court of Appeals' order must be affirmed because the Federal Trade Commission's jurisdiction should have been invoked before the commencement of this action.

VI. Even if any unlawful "understanding and agreement," contract, combination, conspiracy or "discrimination" had been proved (which defendant denies), the Circuit Court of Appeals' order must be affirmed because the trial judge erred in excluding evidence offered by defendant in respect of competing cleaning compounds and competitive conditions surrounding the marketing of Old Dutch Cleanser and other facts and circumstances bearing upon the reasonableness and degree of defendant's alleged restriction upon the resale price of Old Dutch Cleanser.

VII. Independent of all the foregoing considerations, the Circuit Court of Appeals' order must be affirmed because the evidence fails to show *facts* sufficient to constitute any basis upon which to predicate any award of damages to plaintiff.

(a) The alleged damages were not proved to have been "by reason" of any violation of the Sherman Act or the Clayton Act.

(b) No rational basis for estimating the alleged damages was afforded by the evidence

nor indicated in the trial judge's charge to the jury.

VIII. Independent of all the foregoing considerations, the Circuit Court of Appeals' order must be affirmed, because the trial judge erred in keeping from the jury proofs that plaintiff could have mitigated and did mitigate its alleged damages.

(a) The trial judge excluded proofs that plaintiff could have sold, and did sell, other cleaning compounds in substitution for Old Dutch Cleanser.

(b) The trial judge excluded proofs that plaintiff mitigated its alleged damages by the publicity and resulting increased business which plaintiff enjoyed from its controversy with defendant.

IX. Independent of all the foregoing considerations, the Circuit Court of Appeals' order must be affirmed because of various rulings which the trial judge made in respect of the admission and exclusion of evidence.

(a) Exclusion of evidence offered by defendant to discredit Mr. Frey's testimony.

(b) Exclusion of proof by cross-examination of Mr. Frey that the Department of Justice had not prosecuted defendant.

(c) Admission of Mr. Sonnehill's testimony that employees of defendant, in conversation with Mr. Sonnehill, had not objected to plaintiff's credit.

X. Independent of all the foregoing considerations, the Circuit Court of Appeals' order must be affirmed because the attitude of the trial judge toward defendant and defendant's counsel, as evidenced by remarks of the trial judge in the presence of the jury, tended to prevent a deliberate and impartial determination of the issues by the jury.

POINT I.

The Circuit Court of Appeals below correctly held that there was no evidence tending to prove any "understanding and agreement," contract, combination or conspiracy in violation of the Sherman Act.

(a) *No "understanding and agreement," contract, combination or conspiracy was proved.*

The plaintiff, in its amended declaration summarized in earlier pages of this brief, based this action absolutely upon the charge that the defendant had an "understanding and agreement with most of the jobbers, wholesale grocers and other grocers throughout the United States, by which understanding and agreement it has and does sell to said jobbers, wholesale grocers and other grocers said Old Dutch Cleanser upon the understanding and agreement that they, the said jobbers, wholesale grocers and other grocers will sell said Old Dutch Cleanser for certain fixed prices to the retail trade" (28). No "understanding and agreement," of any kind whatsoever, in any way relating to the resale price of Old Dutch Cleanser, was

shown by the evidence to exist between the defendant and anyone.

Plaintiff's assertion that there was an "understanding and agreement" regarding the resale price of Old Dutch Cleanser rests wholly upon two facts; first, that defendant *desired* Old Dutch Cleanser to be resold at General Sales List price; and second, that some dealers *did* sell Old Dutch Cleanser at those prices.

The *post hoc propter hoc* fallacy was never better illustrated!

Defendant merely expressed its *desire* that Old Dutch Cleanser be resold at General Sales List prices. If defendant had gone further, and expressed its *anticipation*, or even *certain knowledge*, that its distributing agents would resell Old Dutch Cleanser at General Sales List prices, the proofs would nevertheless have still fallen short of establishing an "understanding and agreement."

How far short, indeed such proofs fall is clear from the decisions in which this Court has considered actual or alleged, "understandings or agreements" in the nature of so-called price maintenance.

In *Robbs-Merrill Company vs. Strass*, 210 U. S., 339, 351, this Court pointed out that what the complainant contended for "embraces not only the right to sell the copies, but to qualify the title of a future purchaser," and held that the copyright did not go so far.

In *Dr. Miles Medical Co. vs. Park & Sons Co.*, 220 U. S., 373, this Court held (as summarized later in *Boston Store of Chicago vs. American Graphophone Co.*, 246 U. S., 8, 21) that "the owner of movables (in that case, proprietary medicines com-

pounded by a secret formula) could not sell the movables and lawfully by contract fix a price at which the product should afterwards be sold, because to do so would be at one and the same time to sell and retain, to part with and yet to hold, to project the will of the seller so as to cause it to control the movable parted with when it was not subject to his will because owned by another, and thus to make the will of the seller unwarrantedly take the place of the law of the land as to such movables."

In *Bauer vs. O'Donnell*, 229 U. S., 1, 11, this Court held that a patentee could not "by notice limit the price at which future retail sales" may be made.

In *Straus vs. Victor Talking Machine Company*, 243 U. S., 490, 500, 501 this Court held that the "license notice" in that case was an attempt to sell property for a full price, and yet to place restraints upon its further alienation, such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest."

In *Motion Picture Patents Company vs. Universal Film Manufacturing Company*, 243 U. S., 502, this Court held (as summarized later in *Boston Store of Chicago vs. American Graphophone Company*, 246 U. S., 8, 25) that "one who had sold a patented machine and received the price, and had thus placed the machine sold beyond the confines of the patent law, could not, by qualifying restrictions as to use, keep under the patent monopoly a subject to which the monopoly no longer applied."

In *Boston Store of Chicago vs. American Graphophone Company*, 246 U. S., 8, 27, this Court held that "a patentee, in connection with the act of de-

delivering his patented article to another for a gross consideration then received," cannot "lawfully reserve by contract a part of his monopoly right to sell."

In *U. S. vs. Colgate & Company*, 250 U. S., 300, this Court held that even though a substantial uniformity of resale prices existed because dealers generally followed the suggestions and expressed wishes of the manufacturer or original owner, nevertheless no law was violated, because there was no contract.

In *U. S. vs. Schrader's Son, Inc.*, 252 U. S., 85, 99, this Court held that there was an "obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices."

From the foregoing it is plain that only when the manufacturer or original owner of an article has imposed an actual "restraint upon its further alienation" by the dealer who purchased and owns it, with intent that such dealer shall hold his title subject to such "restraint upon its further alienation," does the arrangement constitute an "understanding or agreement," contract, combination or conspiracy in violation of the anti-trust laws.

Nothing in the present case at all approaches such a state of facts.

The summary of the evidence in earlier pages of this brief shows that neither Mr. Frey, nor Mr.

Thomas, nor Mr. Reiter, nor Mr. Edgerton, nor Mr. Schwab, nor Mr. Drury, nor Mr. Snow, nor Mr. Banghardt, nor any other witness in this case testified that he ever had any "understanding or agreement" with the defendant or anyone else on this subject. Upon a point so important as this, the defendant's counsel have felt justified in expanding their summary of the evidence, so as to include in the witnesses' own words substantially every syllable of their testimony on this subject; and the attention of this court is therefore asked to this summary in earlier pages of this brief. That the defendant *desired* Old Dutch Cleanser to be resold at General Sales List Prices, and freely disclosed to the trade its desires in that regard, is undeniable. Even though, as shown under Point VI, the circumstances justifying these desires of the defendant were excluded from evidence by the judge, the evidence still shows pretty clearly that the defendant's desires were emphatically in accord with those of practically all its distributing agents. That these distributing agents generally, but by no means always, sold Old Dutch Cleanser at the General Sales List prices, and did so because they wanted the profit which these prices yielded, is unequivocally shown by the evidence. Considerable effort was expended by plaintiff's counsel in trying to dissect the motives of the distributing agents who testified on this point. Substantially all their testimony is set forth in their own words in the summary of the evidence in earlier pages of this brief. If the defendant's counsel were to paraphrase their testimony, it would be something like this:

"We do sell lots of articles at the price the manufacturer asks us to; not because we have entered into any agreement to do so, nor through fear of the manufacturer should we sell them at another price, but simply because the price at which the manufacturer has asked us to sell, is about the price which we would sell these goods at even though the manufacturer had not taken up the resale price with us at all, and because we do not find the competition causes us to sell at any lower price and the price shows us our proper margin of profit" (106).

The plaintiff can hardly contend that this shows any "understanding and agreement," contract, combination or conspiracy of any kind, for these happen to be the identical words which Mr. Frey, after all the occurrences in suit herein and just on the eve of commencing this action, used in a public statement (106) (which the judge excluded from evidence) in which Mr. Frey announced that the plaintiff was beginning this suit because it was "thoroughly opposed to the policy of price maintenance" and in which he defined the plaintiff's attitude in this very action (103-107).

(b) *No "monopoly" was proved.*

No "monopoly" by the defendant was alleged in the amended declaration nor proved upon the trial. That the control by the defendant of the trade mark Old Dutch Cleanser, or even the marketing of Old Dutch Cleanser, would not constitute "monopoly" within the meaning of the anti-trust laws is shown in several of the cases cited under Point VI.

Great Atlantic & Pacific Tea Company vs. Cream of Wheat Company, 224 Fed., 566 (affirmed, Circuit Court of Appeals, Second Circuit, 227 Fed., 46).

U. S. vs. Quaker Oats Company, 232 Fed., 499.

Baran vs. Goodyear Tire & Rubber Co., 256 Fed., 570.

(c) *No refusal to sell was proved.*

While the plaintiff's witnesses repeatedly stated that the defendant had refused to sell the plaintiff Old Dutch Cleanser, it was always conceded that ever since February 3, 1914, the plaintiff always offered to sell the plaintiff Old Dutch Cleanser in 25 case lots, which was the plaintiff's minimum order, at \$3.20, less 2% discount, leaving the net price less than \$3.14 per case (96, 125).

There was, therefore, no refusal to sell; and in the face of the evidence summarized in the earlier pages of this brief showing, by Mr. Frey's own admission, the profit of twenty cents and more per case which he could have made on it at that price, a profit considerably exceeding the rate of profit he claimed to make on his entire business, it is idle for Mr. Frey to contend that the defendant, in quoting this price to him, was "practically" refusing to sell to him.

(d) *Even if a "refusal to sell" had been proved (which defendant denies), it could not, under the circumstances proved herein, constitute any violation of the Sherman Act or Clayton Act.*

The present case, and the rule governing it, was stated by the Circuit Court of Appeals in its opinion herein, as follows:

"The defendant manufactured and sold Old Dutch Cleanser and developed a large trade in that article by extensive advertisements in newspapers and magazines and by circulars and solicitors. Considering the maintenance of a fixed price necessary to an adequate profit, defendant adopted the following means of promoting sales and maintaining the wholesale price: It sold only to jobbers and wholesalers, who were expected to sell only to retailers. Soliciting agents were sent to retail merchants and orders taken from them at the list price to be transmitted to any jobber that the retailer named of the jobbers to whom the defendant was selling. These jobbers selected by defendant though called distributing agents were purchasers to whom defendant sold at a fixed deduction or discount from the list price. This discount was intended as the jobber's profit. By circulars and personal interviews, jobbers were insistently exhorted to maintain the fixed prices in their own interest and that of the defendant. The jobbers knew they were expected to maintain the prices fixed by the defendant and that they were liable to be cut off if they refused. There was occasional underselling by dealers and perhaps occasional disregard by the defendant of isolated acts of underselling. But the plan of the defendant was generally acquiesced in by jobbers, and its request or demands that the prices be maintained were generally complied with. There was no formal written or oral agreement with jobbers for the maintenance of prices.

"The plaintiff was a jobber on defendant's list of 'distributing agents' who had a considerable trade in Old Dutch Cleanser. Believing that by the elimination of certain expenses usually incident to the wholesale business, it could afford to sell Old Dutch Cleanser at less than the price enjoined by defendant, plaintiff reduced the price below that fixed by defendant. For that reason, the defendant refused to sell plaintiff at its usual discount from the list price, thus cutting off its business by making it impossible for it to compete with other jobbers at a profit.

"The vital question is whether defendant's method of business coupled with the acquiescence of its customers therein by observing its requests or demands to maintain prices was such co-operation between seller and purchasers as amounted to a combination in restraint of trade within the rule laid down in *Dr. Miles Medical Company vs. Park & Sons Company*, 220 U. S., 373, and other following cases. We are obliged to hold that the question has been clearly answered in the negative by the Supreme Court in *United States of America vs. Colgate & Company*, decided June second, 1919. The Court expressly held that the announcement in advance that customers were expected to charge a price fixed by the seller and that the penalty for refusal to maintain prices would be refusal to sell to the offending customer, observance of the request to maintain prices by customers generally, and the actual enforcement of the penalty by refusal to sell to such customers as failed to

maintain the price did not constitute a violation of the trust statute. Nothing more was done by the defendant and its customers in this case.

"Since the defendant, under the Colgate case, merely exercised the right reserved by the Clayton Act to dealers of 'selecting their own customers in *bona fide* transactions and not in restraint of trade,' the plaintiff cannot recover under its charge of unlawful discrimination in price" (pages 555-556).

In *U. S. vs. Colgate & Company*, 250 U. S., 300, this Court said:

"The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade. In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. 'The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases.' *United States vs. Trans-Missouri Freight Association*, 166 U. S., 290, 320. 'A retail dealer has the unquestioned

right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade.' *Eastern States Retail Lumber Dealers' Association vs. United States*, 234 U. S., 600, 614. See also *Standard Oil Co. vs. United States*, 221 U. S., 1, 56; *United States vs. American Tobacco Co.*, 221 U. S., 106, 180; *Boston Store of Chicago vs. American Graphophone Co.*, 246 U. S., 8. In *Dr. Miles Medical Co. vs. Park & Sons Co.*, *supra*, the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell" (pages 307-308).

In *U. S. vs. Schrader's Son, Inc.*, 252 U. S., 85, this Court said:

"It seems unnecessary to dwell upon the obvious difference between the situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements—whether express or implied from a course of dealing or other circumstances—with all customers throughout the different States which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to

take away dealers' control of their own affairs and thereby destroy competition and restrain the free and natural flow of trade amongst the States" (pages 99-100).

See also:

U. S. vs. Trans-Missouri Freight Assn., 166 U. S., 290, 320.

Northern Securities Co. vs. U. S., 193 U. S., 197, 361.

Adair vs. United States, 208 U. S., 161, 172, 173.

Grenada Lumber Co. vs. Mississippi, 217 U. S., 433.

Standard Oil Co. vs. U. S., 221 U. S., 1, 56.

U. S. vs. American Tobacco Co., 221 U. S., 106, 180.

Eastern States Lumber Assn. vs. U. S., 234 U. S., 600, 614.

Other Federal Courts have laid down the same rule:

Dueber Watch Case Company vs. Howard Watch Company, 66 Fed., 637, 645 (C. C. A., 2nd C.);

In re Grice, 79 Fed., 627, 642;

Whitwell vs. Continental Tobacco Company, 125 Fed., 454, 460 (C. C. A., 8th C.);

Jayne vs. Loder, 149 Fed., 21, 27 (C. C. A., 3rd C.);

Union Pacific Coal Company vs. U. S., 173 Fed., 737, 739 (C. C. A., 8th C.).

Greater New York Film Co. vs. Biograph,
 203 Fed., 39 (C. C. A., 2nd C.) ;
Locker vs. American Tobacco Co., 218 Fed.,
 447 (C. C. A., 2nd C.) ;
Great Atlantic & Pacific Tea Company vs.
Cream of Wheat Co., 224 Fed., 566, 572-
 575, affirmed, 227 Fed., 46 (C. C. A.,
 2nd C.) ;
Baran vs. Goodyear Tire and Rubber Co.,
 256 Fed., 570.

POINT II.

The Circuit Court of Appeals correctly held that there was no evidence tending to prove any "discrimination" in violation of the Clayton Act.

Section 2 of the Clayton Act provides that "it shall be unlawful for any person . . . either directly or indirectly to discriminate in price between different purchasers of commodities where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition: *And provided*

further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

The evidence in this case negatives none of these provisos. No "monopoly" or tendency to "monopolize" was either alleged or proved. The trial judge, as will be shown under Point VI, excluded all proofs of competitive conditions and of the effect thereon of the defendant's acts. Furthermore, as appears from *Great Atlantic & Pacific Tea Company vs. Cream of Wheat Company*, 224 Fed., 566, 573, "there is nothing in the Clayton Act to compel or induce courts to hold that the trade restraint referred to by this statute differs in kind, quality or degree from that now held to be meant by the Sherman Act. * * * Section 2 plainly identifies the lessening of competition with restraint of trade." It follows, therefore, from the preceding Point, that no unlawful "discrimination" was proved.

POINT III.

Even if there were any evidence tending to prove any unlawful "understanding and agreement," contract, combination, conspiracy or "discrimination" (which defendant denies), the Circuit Court of Appeals' order must be affirmed, because the Trial Judge erred in his charge to the jury relating thereto.

Even if the Circuit Court of Appeals erred (which defendant denies), in one or all the errors

assigned and specified by plaintiff, nevertheless this Court, because of errors of the trial judge mentioned in this Point, must affirm the order of the Circuit Court of Appeals directing final judgment for defendant.

How erroneously the trial judge charged the jury on this point appears from the following extracts from the charge:

"In point of fact, there seems to be little room for controversy as to this first count on any possible question, except whether there was a combination, and as to whether what the defendant did with reference to Frey was a refusal or mere discrimination. I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act." (page 442).

"If you shall find a refusal in furtherance of a combination to maintain prices, you should find for the plaintiff under the first count, and it will then be unnecessary for you to give any attention to the second count.

"I should say, and perhaps I have already said it, that a combination, contract, agreement, conspiracy, or whatever you choose to call it, does not have to be made in any formal way. If you know that I want you to do something and you know I will not deal with you unless you do do that something, and you keep on doing it, there may be an agreement between us to do that very thing, though never a word has been said. In other words, you will understand that if the persons were actually, deliberately, each knowing the purpose of the other, co-operating and working together to obtain the same result, then you can find that the agreement, or whatever you choose to call it, existed.

"The second count charges the violation of the Clayton Act, which makes it unlawful for any person engaged in commerce in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, where the effect of such discrimination may be to substantially lessen competition, or tend to create a monopoly in any line of commerce. There is no question that defendant did charge plaintiff more for Old Dutch Cleanser than it charged others in like line of business with plaintiff, and if you shall find, as from the evidence you may very well find, that the intent of such discrimination was to maintain the resale prices fixed by the defendant, you may well find that the effect of such discrimination was to substantially lessen competition, as you may find in view of the repeated warnings given by defendant

in its literature that the discrimination against plaintiff would operate to make other jobbers and wholesalers fearful to indulge in any competition in price in this article" (pages 443-444). * * *

"I have said to the jury, and I think I have made that perfectly plain, that in this particular case, or in any case they are not to take into account the effects, good or bad, which the person who fixes the prices thinks will follow the fixing of the prices; if the thing itself that he does in the way of cutting off the man is done for the sole purpose of keeping up the price, then it is a violation of the law. The fact that there are a hundred beneficent purposes that the person who does it thinks will follow from the keeping up of the price, that is immaterial" (page 447). * * *

"(563) Mr. Montague: I except also to so much of your Honor's charge as stated in substance that had the defendant refused to sell the plaintiff that would have constituted a violation of the Anti-Trust Laws.

"The Court: If he refused to sell it with the purpose of furthering a scheme to maintain prices" (page 454).

"Mr. Montague: I also respectfully except to so much of your Honor's charge as indicates that an unlawful contract and combination or conspiracy or understanding is shown where it appears that in the absence of an express obligation some dealer, responding to a suggestion from Cudahy Packing Company, may have sold at the prices mentioned in its literature.

"The Court: All a question of fact for the jury. All I can say on such questions is that the jury, when they come into this jury box, I do not suppose, leave their common sense behind" (page 457).

Errors by the trial judge in the above and other portions of his charge upon this point were assigned by defendant in defendant's Assignment No. 120 (Prayers 1, 2, 3, 8, 9, 10, 14, 15, 16, 17, 18, 19, 22, 23, 28, 30, 31, 38, 39, 40, 41, 52), and Assignment Nos. 122, 123, 124, 125, 126, 127, 128, 129, 131, 133, 134, 135, 138 (pages 513-542).

POINT IV.

Even if any "understanding and agreement," contract, combination or conspiracy in violation of the Sherman Act had been proved (which defendant denies), the Circuit Court of Appeals' order must be affirmed because the Trial Judge refused to grant a bill of particulars.

Even if the Circuit Court of Appeals erred (which defendant denies) in one or all the errors assigned and specified by plaintiff, nevertheless this court, because of errors of the trial judge mentioned in this Point, must affirm the order of the Circuit Court of Appeals directing final judgment for defendant.

The defendant's demand for a bill of particulars asked, among other things, "the names and addresses of the jobbers, wholesale grocers, and

grocers with whom defendant made any alleged resale contract or contracts * * * whether such alleged resale contract or contracts with jobbers, grocers and wholesale grocers were oral or written * * * when, where, through whom and by what acts the defendant has tried to prevent jobbers, grocers and wholesale grocers from selling to the plaintiff and the names and addresses of such jobbers, grocers and wholesale grocers" (17). The judge disallowed the defendant's demand (21); but on the trial the judge permitted the plaintiff to show that he applied by letter for Old Dutch Cleanser to a long list of wholesale grocers in several cities (63-76) and to get Old Dutch Cleanser from Mr. Thomas (176-177). This, and other evidence, was admitted by the judge on the theory of a continued "understanding and agreement," contract, combination or conspiracy between the defendant and its distributing agents (177, 180, 173). The defendant claimed surprise upon the trial but its objections were overruled. That the defendant was entitled to the particulars above mentioned is well settled under the authorities.

Maryland Code, Art. 75, Sec. 24, Para. 107.

Cairnes vs. Pelton, 103 Md., 44.

Patterson vs. Corn Exchange, 197 Fed., 686.

O-So-Ezy Mop Co. vs. Channel Chemical Co., 230 Fed., 469.

The pertinent part of the *Maryland Code* is as follows:

"Either party may require a bill of particulars when the pleading is so general as not to

give sufficient notice to the opposite party of the evidence to be offered in support of it."

Rodriguez vs. U. S., 198 U. S., 156, does not support plaintiff's contention that an exception was necessary to the denial of defendant's motion for a bill of particulars. If formal exceptions were necessary, they were reserved by defendant's exceptions to the admission of Mr. Thomas' testimony (175-204) and were raised by defendant's Assignments, Nos. 77-94 (pages 490-495) and Nos. 141 (page 542) and 77 to 93 (pages 490-4).

POINT V.

Even if any "discrimination" in violation of the Clayton Act had been proved (which defendant denies), the Circuit Court of Appeals' order must be affirmed because the Federal Trade Commission's jurisdiction should have been invoked before the commencement of this action.

Even if the Circuit Court of Appeals erred (which defendant denies) in one or all the errors assigned and specified by plaintiff, nevertheless this Court, because of errors of the trial judge mentioned in this Point, must affirm the order of the Circuit Court of Appeals below directing final judgment for defendant.

Construing Sections 2, 8 and 9 of the Interstate Commerce Act, as they stood in 1903 when they bore a striking analogy to Sections 2 and 11 of the present Clayton Act, this Court held that the Interstate Commerce Act forbade all unjust dis-

criminations and preferences and empowered the Commission to hear complaints concerning the violation of the Act and, if the complaints were well founded, to order the carriers to desist from such violations in the future. After a careful review of the provisions of the Act in the light of these purposes, this Court concluded that before a shipper could recover damages in the federal courts for having been required to pay a discriminatory rate, there must be a determination by the Interstate Commerce Commission that the rate in question was an unlawful discrimination within the meaning of the Act.

Texas & Pacific Railway Company vs. Abilene Cotton Oil Company, 204 U. S., 426;

See also,

Mitchell Coal & Coke Company vs. Pennsylvania R. R. Company, 230 U. S., 247;
Morrisdale Coal Company vs. Pennsylvania R. R. Company, 230 U. S., 304.

Pennsylvania Railroad Company vs. International Coal Company, 230 U. S., 184, on which the court below herein relied (14-15, reported in *Frey vs. Cudahy Packing Company*, 232 Fed., 640), in overruling the defendant's demurrer which raised this point against the declaration herein (14), cannot be considered an authority against the proposition above stated, for in that case there was absolutely nothing for the Interstate Commerce Commission to decide. The tariff filed by the railroad was the reasonable rate, and the only one that could be considered by the Commission or the Court.

While the Federal Trade Commission cannot, of course, award damages to plaintiff, the Commission can determine whether Section 2 of the Clayton Act is violated by the defendant's Old Dutch Cleanser distributing plan; and it is defendant's contention that Congress meant that until the Commission had so found, the rule of the cases above mentioned in respect of the Interstate Commerce Act should apply, and that no individual should be allowed to recover damages by private suit.

This question was raised by defendant's Assignment No. 139 (page 542).

POINT VI.

Even if any unlawful "understanding and agreement," contract, combination, conspiracy or "discrimination" had been proved (which defendant denies), the Circuit Court of Appeals' order must be affirmed because the Trial Judge erred in excluding evidence offered by defendant in respect of competing cleaning compounds and competitive conditions surrounding the marketing of Old Dutch Cleanser and other facts and circumstances bearing upon the reasonableness and degree of defendant's alleged restriction upon the resale price of Old Dutch Cleanser.

Even if the Circuit Court of Appeals erred (which defendant denies) in one or all the errors

assigned and specified by plaintiff, nevertheless this Court, because of errors of the trial judge mentioned in this Point, must affirm the order of the Circuit Court of Appeals directing final judgment for defendant.

No "understanding and agreement" violates the Anti-Trust Laws unless, in the light of reason, upon all the facts and circumstances of the particular case, it constitutes such an undue restriction of competition in some line of commerce as to monopolize or (unduly) restrain trade.

Standard Oil vs. United States, 221 U. S., 1, 58, 60, 62.

U. S. vs. American Tobacco Co., 221 U. S., 106, 179.

Continental Wall Paper Co. vs. Voight & Sons Co., 212 U. S., 227, 266.

U. S. vs. Union Pacific Railroad Company, 226 U. S., 61, 84.

United States vs. Reading Co., 226 U. S., 324, 370.

Nash vs. United States, 229 U. S., 373, 376.

Eastern States Retail Lumber Dealers Association vs. United States, 234 U. S., 600, 613.

No "understanding and agreement" in the nature of so-called resale price maintenance violates the anti-trust laws unless, in the light of reason, upon all the facts and circumstances of the particular case, it constitutes such an undue restriction of competition in some line of commerce as to monopolize or (unduly) restrain trade.

If this be not sound doctrine, then "understandings and agreements" between manufacturers and their dealers in the nature of so-called resale price maintenance constitute the single, unique and anomalous exception to the universality of the rule above stated, and the "light of reason" set up by the Supreme Court in the Standard Oil and American Tobacco cases, which illumines and determines the legality, under the anti-trust laws, of all other human relations, has no application to "understandings and agreements" between manufacturers and their dealers in the nature of so-called price maintenance.

Phillips vs. Iola Portland Cement Co., 125 Fed., 593, 595.

Great Atlantic and Pacific Tea Co. vs. Cream of Wheat Company, 224 Fed., 566, 568, 572, 573, 574 (affirmed 227 Fed., 46, C. C. A., 2nd C.) ;

United States vs. Quaker Oats Company, 232 Fed., 499, 502, 503, 504 ;

Ford Motor Company vs. Benjamin E. Boone, Inc., 244 Fed., 335, 338, 342 (C. C. A., 9th C.).

As has been stated in the decisions of this Court, cited at the beginning of this point, "the surrounding circumstances," "all the circumstances connected with the transaction," "the facts and circumstances of each individual case," and "all the surrounding circumstances, which may be multifarious," must "be considered in order to determine the fundamental question whether the necessary effect of the combination is to restrain interstate commerce."

Over the defendant's exceptions, the judge excluded proofs that in the Baltimore market Old Dutch Cleanser was subject to competition from Spotless Cleanser, Babbitt's Cleanser, Octagon Cleanser, Kirkman's Powder, Bon-Ami, Sil San, Bestene and other brands of cleaning compounds, aggregating in all thirty-two in number (127, 128, 137-141, 145-147, 287, 288). The judge stated his reasons as follows: "Such testimony, as I understand it, is expressly held to be improper in this case by the court which controls me. The last one of these cases which was here was a case in which I followed a rule that I am rather fond of, to let in everything that anybody could think was material to the case, and then, after it was all in, exclude it by the prayers, to exclude what I thought the jury ought not to consider, and the Court of Appeals thought that was going too far, and I think they have ruled that if you attempt to fix prices, if you have any combination or agreement to fix prices, it does not make any difference whether there is any particular article in competition or not" (138).

Over the defendant's exceptions, the judge excluded (330-332, 404-407) the deposition *de bene esse* of Mr. Straus, the defendant's Old Dutch Cleanser Department manager (329-408), on the ground that it was immaterial, and on the further ground that on cross examination Mr. Straus had declined, under advice of counsel, to answer in his deposition questions calling for a disclosure of confidential figures in respect of costs, profits, sales and advertising expenses of the defendant (373-376, 380-382). None of these matters bore on any of the issues in this case, and it was shown that

they had always been treated as wholly confidential, and that if they were made public they would undoubtedly be misused by the defendant's competitors (373, 375, 387, 397, 398). Mr. Straus' declination to answer these questions in his deposition, therefore, was not a proper ground for excluding it from evidence.

Because of the judge's ruling throughout the trial that "if you attempt to fix prices, if you have any combination or agreement to fix prices, it does not make any difference whether there is any particular article in competition or not" (138), the defendant's counsel was precluded from putting in other evidence which he could have put in if the rule above set forth had been applied (407).

Because of these and other rulings of the judge, set forth in the defendant's assignments, the jury had no proofs in respect of any of the competitive prices surrounding the marketing of cleaning compounds in general and Old Dutch Cleanser in particular, nor any proofs in respect of the defendant's method of marketing Old Dutch Cleanser, its use of its General Sales List, its selection of distributing agents as the medium for supplying the retail trade or as the adjuncts to its own salaried force in the solicitation of this retail trade, nor any proofs in respect of the commercial and economic grounds on which the defendant relies for the proposition that its method of marketing Old Dutch Cleanser and its conduct toward the plaintiff, in view of the competition to which the defendant was subject from other cleaning compounds and the competitive conditions surrounding the marketing of Old Dutch Cleanser in Baltimore and elsewhere, were reasonable, and not unduly restrictive, nor

in restraint of trade nor monopolistic within the meaning of the anti-trust laws.

Rulings of the judge excluding evidence offered to show the cleansing compounds competing with Old Dutch Cleanser are set forth in defendant's Assignments Nos. 68 to 73 inclusive (pages 483-4), 113 and 116 (page 502). Rulings excluding evidence as to the reasonableness of the profit made by distributors under defendant's system, are set forth in defendant's Assignments Nos. 99 (page 499) and 112 (page 502).

POINT VII.

Independent of all the foregoing considerations, the Circuit Court of Appeals' order must be affirmed because the evidence fails to show facts sufficient to constitute any basis upon which to predicate any award of damages to plaintiff.

Even if the Circuit Court of Appeals erred (which defendant denies) in one or all the errors assigned and specified by plaintiff, nevertheless this Court, because of errors of the trial judge mentioned in this Point, must affirm the order of the Circuit Court of Appeals directing final judgment for defendant.

Section 7 of the Sherman Act and Section 4 of the Clayton Act provide that a person injured in his person or property "by reason of anything forbidden" in the Sherman Act or the anti-trust laws, as the case may be "may sue therefor . . . and shall recover three-fold the damages by him

sustained, and the costs of suit, including a reasonable attorney's fee."

Even if a violation of the anti-trust laws had been proved, the next question, therefore, would be whether the alleged damages were "by reason" of such violation.

(a) The alleged damages were not proved to have been "by reason" of any violation of the anti-trust laws.

Not only was no "understanding and agreement," contract, combination, conspiracy, "monopoly," unlawful "discrimination," or refusal to sell proved, but even if any had been proved, there was nothing to show that anyone to whom the plaintiff applied for Old Dutch Cleanser was a party thereto, or that anyone else was a party thereto, or that anyone declined to sell the plaintiff Old Dutch Cleanser "by reason" thereof. As the proof stands, the plaintiff's applications to other dealers for Old Dutch Cleanser were simply not accepted or answered.

There is no proof that the dealers to whom plaintiff applied had any Old Dutch Cleanser for sale, nor that they had any "understanding or agreement" with defendant, nor that they declined to accept or answer plaintiff's applications because of any "understanding or agreement" with defendant. Indeed, the proof is that while Mr. Frey's letters applying for Old Dutch Cleanser were out and in the hands of these wholesale grocers, Mr. Frey had issued a public statement denouncing "the jealousy of the high priced jobbers who try to have us cut off whenever possible" and announcing to the retailer that "this house is his greatest friend."

* * * Why do you play in the hands of our com-

petitors * * * remember that if it weren't for Frey you would pay much more for your goods than you do" (109). To infer from this that Mr. Frey's failure to obtain answers to his letters was due to any reason other than the entirely legitimate disinclination of these wholesale grocers to help out an unpleasant competitor is to defy the plain facts of business and human nature.

Erroneous rulings of the judge admitting evidences offered to show a refusal by other wholesalers to sell to plaintiff are set forth in defendant's Assignments Nos. 14 to 19 and 21 to 29 (pages 463-469) and the failure of proof is raised by defendant's Assignment No. 120 (Prayers 46), (page 525), 52 and 53 (pages 526-7).

(b) No rational basis for estimating the alleged damages was afforded by the evidence, nor indicated in this trial judge's charge to the jury.

The jury returned a verdict for \$2,139 for the plaintiff's damages from February, 1914, when the defendant replied to the plaintiff's order by quoting the General Sales List price, to May, 1915, when this suit was commenced (22), and for the additional sum of \$3,375 for the plaintiff's damages from the commencement of this suit to May, 1917, the date of their verdict (22); but so much of their verdict as awarded this latter sum was set aside by the judge (25).

On the question of damages, the judge charged the jury, as follows:

"Now, how are you to determine how much Old Dutch Cleanser the plaintiff would have sold if he had the chance to sell any? Well,

during the three years preceding the time at which defendant took plaintiff off its preferred list, as it calls it, plaintiff had bought and substantially sold some 6,653 cases, or an average of over 2,200 cases a year. The total volume of its business in all lines during that time averaged something like one million three hundred thousand dollars a year, and during the period intervening between the time defendant took the action complained of and the institution of this suit, defendant was doing a business of perhaps one million and a half a year. You may not unnaturally conclude, in view of the high public favor in which the evidence seems to show that Old Dutch Cleanser is held, that plaintiff's sales of Old Dutch Cleanser would have increased proportionately to that of the rest of his business. That is to say, that if plaintiff sold something in excess of 2,500 cases a year of Old Dutch Cleanser during the period elapsing between the cutting off and the bringing of this suit, somewhere upwards of 3,000 cases, and if you shall so find, and you are not bound to, it is entirely in your sound business judgment, you will have to determine what profit plaintiff would have made on such volume of business. He paid about \$2.95 a case for it, less 3% discount. There were some 103 cases which he resold at practically no profit and he claims he sold most of the other 6,653 cases at \$3.40 per case. He admits that there was some cutting. He thinks it was made with only five customers. He is not able to tell what quantity these five customers took. As to them it was sold as

low as \$3.15. He has said he sold almost exclusively in one case of lots, but defendant has produced a large number of orders which tend to show that he may be mistaken as to the small proportion of five case lots ordered by his customers. However, that may be, the testimony would seem to indicate that his average profit on what he sold was not more, and you may think if he had been able to obtain it, would not have been less than Twenty Cents a case, which on 3,000 cases, which you may estimate, as the quantity he would have sold between the time he was cut off and the bringing of this suit, if he had had the chance to make such sales, would be \$600. If you think that he would have obtained a higher average profit, you will increase the estimate of his damage accordingly. Of, course, if you think his profit would have been smaller, you will cut it down. After you have ascertained the actual damage, the law requires you to multiply it by three. If, for example, you find that the plaintiff's actual damage was \$600, and decide that he is entitled to recover therefor, you multiply that \$600 by three, and return a verdict for \$1,800. • • • I shall ask you therefore in your verdict, if you shall find for the plaintiff, to find that its damages up to the date of the bringing of the suit was so much, say for illustration \$1,800, but only for illustration, and that for the two years since the bringing of the suit, in which time you will find he would have sold between five thousand and six thousand cases, that his damages were so much. In each case,

you understand, you first ascertain what the actual damage is, and multiply it by three" (445-446).

Simple calculation shows that the jury found that the plaintiff's damages from February, 1914, to May, 1915, were \$713, which is strikingly close to the figure suggested in the judge's charge.

How the judge or the jury could ever have assumed that the defendant prevented the plaintiff from making twenty cents per case profit, when Mr. Frey's own testimony, summarized in earlier pages of this brief, is that the plaintiff, by selling at \$3.40 per case, could always have made twenty cents profit plus the discount, if it had only bought from the defendant at the General Sales List price of \$3.20 per case less 2% discount leaving a net price of less than \$3.14 per case which the defendant always quoted on all the plaintiff's orders on and after February 3, 1914, is impossible to explain.

On the question of damages, Mr. Frey's testimony, summarized in earlier pages of this brief, is extraordinary.

On February 14, 1914, Mr. Frey wrote to the defendant: "This action taken by you in your letter of the 4th instant would be one of the very best boosts for me" (49). In a public statement to his trade, Mr. Frey announced: "Now, don't worry about Old Dutch Cleanser. We have lots of it and can supply you regularly. Send your orders to Frey" (109). On March 6, 1914, Mr. Frey wrote to the defendant: "I am very glad to say that we have been very successful in the sale of other cleansers which we have substituted on orders for Old

Dutch Cleanser" (54). In another public statement to his trade, Mr. Frey announced on April 4, 1914: "With such Scouring Compounds as Spotless Cleanser, Swift's Pride Cleanser, Babbit's Cleanser, Bon-Ami, Sil San, Bestene, etc., we do not feel that the trade will miss 'Old Dutch Cleansed' very much" (143). On November 13, 1914, more than nine months after the defendant had quoted to the plaintiff the General Sales List price, Mr. Frey wrote to the defendant: "Yesterday for the first time since ceasing to buy direct from you, we wanted a case of Old Dutch Cleanser" (160). In the face of these contemporaneous admissions of the plaintiff, the indefinite statements by the plaintiff's witnesses that the plaintiff had "continued demands" (91), "numerous orders" (289), "quite a large demand" (280), and "lots of requests" (282), accompanied as they were by protestations that the witnesses were wholly unable to testify more definitely, would seem not to be entitled to much weight.

The plaintiff's failure to preserve evidence of these "demands," "orders" and "requests" can hardly be laid to inadvertence. As early as February 26, 1914, just a few days after the defendant had quoted to the plaintiff the General Sales List prices, Mr. Frey had begun an investigation of his alleged legal rights, and had consulted the Department of Justice on the subject (53), which advised him, according to one of Mr. Frey's public statements, that the transactions alleged by Mr. Frey constituted a violation of the anti-trust laws (142-143). That litigation, requiring proof of these alleged "demands" for Old Dutch Cleanser, was probable,

must have been apparent to Mr. Frey from the first. According to the routine of plaintiff's business, old orders were looked over before being destroyed, and orders that might bear upon possible future litigation were preserved (147); and from the testimony of the plaintiff's bookkeeper it would appear that in the plaintiff's possession there were still some papers within the period covered by this action among which the plaintiff did not think advisable to search for orders of Old Dutch Cleanser (289-291, 412-413). The plaintiff did not prove upon the trial a single specific order for Old Dutch Cleanser received at any time during the period covered by this action.

Mr. Frey gave the only evidence in this case which bears upon the probable prices at which the plaintiff subsequent to February 3, 1914, would probably have sold Old Dutch Cleanser. On direct examination, Mr. Frey testified that "except for five people to whom we gave a special price" (87) the plaintiff always sold Old Dutch Cleanser for \$3.40 per case (86-88, 93). Mr. Frey admitted, however, that on this point his testimony was hearsay (86, 87, 161). On cross examination, Mr. Frey further admitted that ever since February, 1914, the plaintiff had been publicly proclaiming its stand for lower prices to the trade than those named in the General Sales List (109-111, 119): "The retail grocer who pays \$3.40, less 2 per cent. for Old Dutch Cleanser when he hauls it himself and pays cash for it is being greatly overcharged. How we wish we could make that much profit on our goods. We would not stay in business but a few years, for we would be rich by that time" (119). In the routine of the plaintiff's business, as described on

cross examination by Mr. Frey and shown by orders for Old Dutch Cleanser that were put in evidence sales at less than \$3.40 a case may almost have been the rule (50, 51, 94, 95, 150-153, 160, 161, 291-295, 302-305). Under the euphemism of "old credits" the plaintiff allowed rebates to the trade on list prices generally, of which no record of any kind was ever kept in the plaintiff's books of account (150-153).

The plaintiff's Old Dutch Cleanser business, according to Mr. Frey, was "very, very small, compared with (plaintiff's) total business"; according to a judge's calculation "a little less than one-half of one per cent." (88). Upon the theory, however, that the rate of increase in the plaintiff's total volume of business might tend to show the probable rate of increase in the plaintiff's Old Dutch Cleanser business after February, 1914, Mr. Frey was permitted to testify that the plaintiff's total volume of business was about \$1,300,000 in 1911, about \$1,400,000 in 1912, a little less than \$1,200,000 in 1913, nearly \$1,600,000 in 1914, approximately \$1,700,000 in 1915 and over \$1,800,000 in 1916 (79-80). What happened in 1916, which was after the commencement of this action, was, of course, immaterial. The plaintiff's purchases of Old Dutch Cleanser from the defendant were 1750 cases in 1911, 3150 in 1912, and 1753 in 1913 (86). While the plaintiff's Old Dutch Cleanser business between 1911 and 1912 was increasing 80 per cent., the plaintiff's total volume of business increased less than 8 per cent. While the plaintiff's total volume of business between 1912 and 1913 was declining over 14 per cent., the plaintiff's Old Dutch Cleanser business declined nearly 45

per cent. Any possible ratio between the growth of the plaintiff's total volume of business and the growth (and decline) of the plaintiff's Old Dutch Cleanser business was completely disproved by the facts, and should not have been suggested in respect of the years following 1913, particularly in view of the other evidence in the case. Yet it was upon the theory of such a ratio that the case was tried and submitted by the judge to the jury. Upon the same theory, Mr. Frey was permitted to testify that the plaintiff's average cost of carrying on business was about $4\frac{1}{2}$ per cent. to 5 per cent. in 1912, a little over 5 per cent. in 1913, a little under 5 per cent. in 1914 and 1915, and a little over 5 per cent. in 1916 (82-84), and that the plaintiff's total expense of doing business was \$60,326.42 in 1912-1913, \$67,459.82 in 1913-1914, \$70,977.78 in 1914-1915, and \$74,646.02 in 1915-1916 (88), and that the plaintiff's gross profits were over 6 per cent. in 1914, a little over 9 per cent. in 1915, and between 8 and 9 per cent. in 1915 and 1916 (83), and that the plaintiff's net profit ranged from "something over one per cent. to . . . a little over four per cent. last year, or just about four per cent." (83-84). What happened in 1916, which was after the commencement of this action, was, of course, immaterial. During this period, furthermore, the plaintiff in a public statement issued broadcast to his trade announced, "we sell you at cost and *only add one per cent. for our profit*. A salesman selling on commission gets two per cent., so when we only ask one per cent. for our compensation, you see how close we work" (157-159). From all these contradictory figures, no possible

ratio to the plaintiff's Old Dutch Cleanser business and profits could possibly be elucidated, and none should have been suggested, particularly in view of the other evidence in this case.

Mr. Frey admitted, on cross examination (123), that between \$3.20 per case, which, less 2 per cent. for cash, leaving a net price of less than \$3.14 per case, was the price which the defendant always quoted to the plaintiff after February 3, 1914, and \$3.40 per case, which, according to Mr. Frey, was the price "we were accustomed at that time to sell" (123), there was a profit of *twenty cents*, or with discount added, a profit of nearly *twenty-seven cents*. This *twenty cents* profit, figured in percentages, amounted to a profit of 6 per cent., and this *twenty-seven cents* profit, figured in percentages, amounted to a profit of nearly 9 per cent. These percentages of profit contrast significantly with the gross profits of over 6 per cent. in 1914, a little under 9 per cent. in 1915, and between 8 and 9 per cent. in 1915 and 1916, on the plaintiff's total volume of business (83). If we are to believe Mr. Frey's contention, then his margin on Old Dutch Cleanser was all net profit because the plaintiff could have sold all the Old Dutch Cleanser in 1912 and 1913 without adding a cent to this cost of doing business (88). Even under those circumstances, however, the plaintiff could have made at all times subsequent to February 3, 1914, net profits of from 6 to 9 per cent. on Old Dutch Cleanser bought at the figure which the defendant continually quoted, which profit would have contrasted favorably with the profit ranging from "something over one per cent. to . . . four per cent." which was all the plaintiff made on its total volume of

business (83-84). Mr. Frey's explanation that he had to "make a long profit on lots of things like Dutch Cleanser and certain other goods to be able to make an average profit on my whole line" hardly puts his testimony in any better light (132).

These are only a few of Mr. Frey's inconsistencies and contradictions on the subject of damages. The same subject may be further pursued in the summary of his testimony in earlier pages of this brief to which the attention of this court is invited. Mr. Frey's testimony was the only evidence in the case on this subject. That it affords no rational basis for estimating the alleged damages of the plaintiff is indisputable under the authorities.

American Sea Green Slate Co. vs. O'Halloran, 229 Fed., 77 (C. C. A., 2nd Circuit).

In *Central Coke & Coal Co. vs. Hartman*, 111 Fed., 96 (C. C. A., 8th Circuit), the Court said:

"The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which forms a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully

rendered. These are fundamental principles of the law damages" (98).

The insufficiency of the evidence as to damages was raised by exceptions to the judge's charge, set forth in defendant's Assignments Nos. 136 and 137 (pages 540-541), Assignment No. 120, Prayers 54, 55, 56 (page 527), 60, 1, 2, 3, 5 and 8 (pages 529-532), and Assignment No. 110 (page 501).

POINT VIII.

Independent of all the foregoing considerations, the Circuit Court of Appeals' order must be affirmed, because the Trial Judge erred in keeping from the jury proofs that plaintiff could have mitigated and did mitigate its alleged damages.

Even if the Circuit Court of Appeals erred (which defendant denies) in one or all the errors assigned and specified by plaintiff, nevertheless this court, because of errors of the trial judge mentioned in this Point, must affirm the order of the Circuit Court of Appeals below, directing final judgment for defendant.

The plaintiff, of course, was required to use reasonable diligence to mitigate its alleged damages. If the plaintiff could have procured other cleansers and made the same profit on them, it was not entitled to any damages.

Lowry vs. Tile Mantel & Grate Assoc.,
106 Fed., 38.

(a) *The trial judge excluded proofs that the plaintiff could have sold, and did sell, other cleaning compounds in substitution for Old Dutch Cleanser.*

As has already been shown under Point VI, the judge excluded all proofs in respect of competing cleaning compounds. This was error for the reasons stated under Point VI, and also because, by Mr. Frey's own admission, "we have been very successful in the sale of other cleansers that we have substituted on orders for Old Dutch Cleansers" (54). * * * With such Scoring Compounds as Spotless Cleanser, Swift's Pride Cleanser, Babbitt's Cleanser, Bon Ami, Sil San, Bestene, etc., we do not feel that the trade will miss 'Old Dutch Cleanser' very much" (143), and the defendant was therefore entitled to show that the plaintiff could have sold, and did sell, other cleaning compounds in substitution for Old Dutch Cleanser and thus mitigated its alleged damages.

Rulings of the judge excluding evidence competent and material for this purpose are set forth in defendant's Assignments Nos. 68 to 74 (pages 483-484) and 113 (page 502).

(b) *The trial judge excluded proofs that the plaintiff mitigated its alleged damages by the publicity and resulting increased business which it enjoyed from its controversy with the defendant.*

Controversy with the defendant meant for the plaintiff another opportunity for splendid sensational advertising and increase of the plaintiff's trade. "This action taken by you in your letter of

the 4th Inst.," wrote Mr. Frey on February 14, 1914 to the defendant, "would be one of the very best boosts for me" (49). On February 23, 1914, and again on April 4, 1914, Mr. Frey circulated public statements to the trade exalting the plaintiff as the champion of low prices to the retailer (109, 142, 143). On April 19, 1915, and again on the eve of commencing this action, Mr. Frey issued similar public statements (110, 111, 97, 107). These statements are all discussed in the summary of the evidence in earlier pages of this brief. The defendant was entitled to show that this publicity and resulting increased business of the plaintiff mitigated the plaintiff's alleged damages.

Erroneous rulings of the judge excluding evidence offered for this purpose are set forth in defendant's Assignments Nos. 56, 57 (page 477), 61 to 66 (pages 480-482), 50-51 and 53 (475-476).

POINT IX.

Independent of all the foregoing considerations, the Circuit Court of Appeals' order must be affirmed because of various rulings which the Trial Judge made in respect of the admission and exclusion of evidence.

Even if the Circuit Court of Appeals below erred (which defendant denies) in one or all the errors assigned and specified by plaintiff, nevertheless this court, because of errors of the trial judge mentioned in this Point, must affirm the order of the Circuit Court of Appeals, directing final judgment for defendant.

The principle rulings of the judge which come under this head are as follows:

(a) *Exclusion of evidence offered by defendant to discredit Mr. Frey's testimony.*

Mr. Frey belittled the selling of Old Dutch Cleanser through defendant's "missionaries" by testifying that 50 per cent. of the orders that came to him through them were refused by the retailers (129). More important, on the question of damages, he testified that the plaintiff's sales were in not less than five-case lots, and, therefore, at \$3.40 per case. Evidence offered by defendant to show that Mr. Frey's statements were not true was excluded by the rulings set forth in defendant's Assignments Nos. 101-103 (page 499).

(b) *Exclusion of proof by cross examination of Mr. Frey that the Department of Justice had not prosecuted the defendant.*

This was especially prejudicial to the defendant after the plaintiff's counsel had read a letter to the jury in which the plaintiff stated, "We are to-day turning all the papers in this matter over to the United States District Attorney" (53). The exceptions are set forth in defendant's Assignments Nos. 58-60 (page 480).

(c) *Admission of Mr. Sonnehill's testimony that employes of the defendant, in conversations with him, had not objected to plaintiff's credit.*

The jury was allowed to infer from this testimony that defendant had no objection to plain-

tiff in the matter of credit. In view of Mr. Sonnehill's duties there was no reason why the matter of credit should be discussed at all. The exception is set forth in defendant's Assignment No. 107 (page 500).

Many other exceptions, well founded when taken, became unimportant in the light of subsequent testimony.

POINT X.

Independent of all the foregoing considerations, the Circuit Court of Appeals' order must be affirmed, because the attitude of the Trial Judge toward defendant and defendant's counsel, as evidenced by remarks of the Trial Judge in the presence of the jury, tended to prevent a deliberate and impartial determination of the issues by the jury.

Even if the Circuit Court of Appeals below erred (which defendant denies) in one or all of the errors assigned and specified by plaintiff, nevertheless this Court, because of errors of the trial judge mentioned in this Point, must affirm the order of the Circuit Court of Appeals below, directing final judgment for defendant.

The course of the trial was marked by comments by the judge in the presence of the jury unusual in tone and number and prejudicial to defendant. When the defendant's counsel objected to proof of conversations with persons not proved to be authorized in any way to bind the defendant, the

judge said: "Twelve men have got to be allowed to hear a story without these continued interruptions . . . we must get along in this case, gentlemen, and the witness must be allowed to tell his story. It is impossible to pay attention to what the witness says with the constant interruption (41-42). . . . How can this law or any law be enforced in dealing with a large corporation which employs hundreds of agents if the man who deals with these agents cannot tell that these agents came to see him and he has got to go into your internal organization to prove just precisely what position they occupied and all that sort of thing. I do not know how it can be done" (44). When the defendant's counsel objected to Mr. Frey's testifying in round figures and percentages to his "average cost of carrying on business," the judge said: "The quantum of damages in this case will not probably run into a very large figure. It is not real important, gentlemen, and I am suggesting it to you as practical common sense on both sides, that to be precisely and minutely accurate on such questions as the percentage of profit is in this quite unnecessary. If, as I guess from what I heard in another similar case, he does not figure a very large percentage of profit, it will not be important. If he were claiming twenty-five or thirty-five or forty per cent. profit, it would be worth your while to show whether he was or not five or ten per cent. too high. . . . If you gentlemen want an opportunity for an expert to examine these books on this question I think I am bound to let your people examine his books. Now, whether it is worth while to go through the form of bringing up a lot of these books to this court room, or to let you go down and ex-

amine them at his place, is another question" (81-82). When the defendant's counsel objected to Mr. Frey's testifying that his employee, Mr. Swift, had told him he had cut prices to only five people and the defendant's counsel urged that the plaintiff's books of account would be the best evidence, the judge said: "It would be an awful job to go through those books and figure it out. Perhaps the books will not show it very clearly. * * * Some of the bills may have been billed an 'old credit,' or some other such statement put on the bill, which really is a rebate" (86). When the defendant's counsel objected to Mr. Frey's testifying broadly that "we were having continued demands for Old Dutch Cleanser" the judge said: "I do not suppose he can tell you any more than that" (92); and then turning to Mr. Frey, the judge added: "As I understand it, Mr. Frey did not keep a record of that. His present impression is that there was a great deal of demand for it, the precise quantity of the demand he has no means of telling you. Now we can talk for a week and I do not suppose he would say any more than that. Isn't that true?" (92). Nothing of the kind had previously been testified by Mr. Frey, but of course Mr. Frey promptly adopted the judge's statement (92). When the defendant's counsel objected to Mr. Frey's testifying regarding the percentage of profit he made on his total volume of business, the judge again answering in place of Mr. Frey, said: "He has proved that he never got less than \$3.15 for his Dutch Cleanser, sometimes he sold for \$3.40, and I do not think you need go very much into the net and gross profit of his general line of business. * * * We have the volume of business done each year and the cost of doing that business and

he has told us what is the minimum and maximum profit in gross that he made on Old Dutch Cleanser and he has told us that it added nothing to his cost or very little to his cost to sell six or seven thousand dollar's worth of Dutch Cleanser a year. Now you have all the facts, I think" (93). This was not an accurate statement of the evidence, as appears from the summary of Mr. Frey's own testimony on earlier pages of this brief. Throughout Mr. Frey's cross examination by the defendant's counsel, which, as the summary above mentioned shows, materially altered Mr. Frey's testimony on direct examination, the judge repeatedly permitted Mr. Frey to answer, with explanations not at all responsive to the questions (96). When refusing to receive in evidence an article published by Mr. Frey on the eve of this action, the judge said: "The motives are not generally material, but if so I know of no better motive of any man than to vindicate the law by bringing a matter of the kind to the decision of the courts. Hampden has long been held as a model of a patriot for doing that very thing. * * * I object to the wasting of the time because it cannot possibly interest the jury for one moment" (100). When the defendant's counsel, endeavoring to meet the objection on which this article was being excluded, sought to reframe his questions, the judge referred to him in this language: "I am not going to stop him from doing it. My judgment is that counsel seldom, with juries, advantage themselves by doing anything that is improper. * * * The jury sees it was well as I do, and it is the jury that usually visits the penalty" (102). When the defendant's counsel on cross examination was pressing Mr. Frey to admit that he

could always have bought Old Dutch Cleanser at the price of \$3.20 per case the judge, again answering in place of Mr. Frey, said: "It is simply this, in his view, right or wrong, the Cudahy people, when they offered to sell at \$3.20 knew that would not interest him, and he could not buy goods at that price. That has already been explained" (115). When the defendant's counsel on cross examination was developing the contradictions between Mr. Frey's testimony on direct examination and his letters to the defendant and his contemporaneous public statements, the judge, again answering in place of Mr. Frey, said: "Mr. Montague, my view is this, on that question, that if you do a thing which improperly in a specific way does a specific damage to a man, the fact that he is quick-witted enough and bright enough to get popular sympathy and help in the rest of his business because you have done him that wrongful thing does not affect the issue between you one bit, not the slightest" (121). When the defendant's counsel on cross examination was developing from Mr. Frey the fact that at the very time Mr. Frey claimed he was trying to buy Old Dutch Cleanser from other jobbers and being refused because of an unlawful combination Mr. Frey was circulating public statements denouncing them, the judge said: "My whole impression is that this whole line of inquiry is useless" (135). When the defendant's counsel on cross examination asked Mr. Frey to explain how he arrived at his cost of carrying on business which he had stated in round figures on direct examination, the judge said: "It seems to me that those calculations of his general costs, and all that, have practically very little to do with the case, for this

reason: That he did testify that he had bought Old Dutch Cleanser, that he could buy it, at \$2.92 or \$2.92½ for about one-fourth of what he got, and \$2.95 for all the rest, except three cases, and that he had sold the bulk of it at \$3.40, but that in a certain indefinite quantity, though limited to five customers, sold by a man named Swift, in his employ, at \$3.15" (148). How wide of the facts this statement was, appears from Mr. Frey's own testimony summarized on earlier pages of this brief. When the defendant's counsel, taking his cue from the statement of the judge last quoted, sought to have Mr. Frey's calculations of gross profits stricken from the record, the judge said: "At that stage of the case I ruled that in the absence of something better it might have afforded some basis for the calculation. But now you have got more definite and more precise testimony in, and the plaintiff will have to stand by that more definite testimony. and I think we would simply be wasting time. If you have any serious doubt as to the volume of his business, I will let you cross examine him about that, because that is somewhat important, because if he was doing a million and a half business, it is quite obvious that the extra cost of selling, ten thousand this year, of Old Dutch Cleanser, would be very small and practically unappreciable but as to the percentage of costs to his business, and all that, I do not believe that we will get enough out of it to pay for the time that would be consumed in going into it. * * * Mr. Baker does not seem to want it to go out. I do not see that it hurts you at all. You can cross examine him. Go ahead. But it seems to me it is wasting your time, and the jury's time, and all our time" (149). When the defendant's counsel on cross examination asked Mr.

Frey why he called it "old credit" when he gave rebates to his customers, the judge, again answering for Mr. Frey, said: "Wait a minute. Mr. Frey, you have already explained what the real reason is. According to your theory there are certain manufacturers, you say, who want their goods always billed at the billed price, but they are not particular whether you actually sell them at the billed price or not, so the public will think they are billed at the list price, isn't that right" (152). Mr. Frey had not previously so testified, but of course he promptly adopted the judge's statement. Again, the defendant's counsel asked Mr. Frey: "Why don't you want to call it rebate?" Again, the judge, answering for Mr. Frey, said: "It is perfectly obvious. He just said that the manufacturer—he says that the manufacturer insists that the bill shall show that the goods were sold at the list figure that they fix on it, but they do not really care whether they are or not, so the form is gone through. You must go through the form. That is his story" (152). There had been no previous testimony to that effect. Again, the defendant's counsel asked Mr. Frey: "And the manufacturers have suggested to you that you use the words "old credit" on your bills instead of using the word "rebate"?" (152). Again, the judge, answering for Mr. Frey, said: "There is no suggestion that they use the words, 'old credit.' According to his idea, he can use any phrase he wants to, as far as they are concerned, provided it does not, on the face of the bill show that they are cutting their price" (152). When the defendant's counsel sought to develop from Mr. Frey other sales by the plaintiff of Old Dutch Cleanser at cut prices, the judge, again

answering for Mr. Frey, said: "He says he does not suppose they did, because when they were buying it in large quantities and getting it cheaper, they were not in the habit of doing it. * * * He answered you by saying that he did not suppose they did, and gave the impression that even when they were getting large quantities of it or limited quantities of it, at the low price, they sold almost all of it at the full price, and he hardly thinks that the few cases they got at a higher price, that they did it" (154). From the summary of Mr. Frey's testimony on earlier pages of this brief, it is clear that the judge in the passage above quoted did not accurately state that testimony. When the plaintiff offered in evidence circulars of the defendant issued two years and three years before any of the transactions in this action (163), circulars which in fact had been superseded by later circulars (92, 93, 175, 273), the judge said: "The important controversy is practically, if not absolutely, identical in all of them, showing a long continued system with reference to this matter which justified the witness in thinking, or might have justified him in thinking, it would be adhered to" (173). When the defendant's counsel, for the purpose of showing the bias of the witness, Mr. Sonnehill, who was the defendant's discharged employee, asked Mr. Sonnehill whether he had not discussed this action many times with Mr. Frey, the judge said: "I cannot see that it makes much difference. Go ahead" (261.). When the defendant's counsel continued to press Mr. Sonnehill regarding the assistance he had rendered Mr. Frey in this action, and plaintiff's counsel objected that it was wasting time, the judge said: "I do not feel quite justified in expressing

whatever positive opinion on that I may have" (262). Throughout the cross examination of Mr. Sonnehill, the judge intervened to stop lines of inquiry by the defendant's counsel, or to answer in place of the witness questions put to the witness by defendant's counsel, or to rebuke the defendant's counsel (263-267). "I think," said the judge, "the jury is probably able to judge about the fairness and unfairness of the question; I do not care to express any opinion of mine about it. I will let the jury pass upon whether this line of examination has been fair or not. * * * Unfortunately, a witness that is brought into a court to testify to anything and whose testimony is of any special importance to the case has to stand a good deal of that. It is pretty hard on him sometimes and very unpleasant to him often, but on cross examination the Court cannot interfere very much" (266-267). When the defendant's counsel inquired of Mr. Sonnehill his interpretation of a rule promulgated by the defendant nearly a year before any of the transactions in this action, the judge stopped Mr. Sonnehill before he could answer and said: "I call your attention to the fact that that circular, so far as it bears on this action with reference to Frey, did not reach him until 22 days after Frey had been cut off and presumably after Frey had been put back again" (275). When the defendant's counsel repeated his question, the judge, again answering for Mr. Sonnehill, said: "That says if you do not succeed in switching, go without the order, and if you can switch, switch" (275). When the defendant's counsel again repeated his question, the judge, again answering for Mr. Sonnehill, said: "I hold that to mean that the first suggestion would be that if we can not take an order through that

man, give us another name. That certainly would not preclude the missionary from naming the jobbers, or some of the jobbers from whom he could get an order" (276). No written document had been offered in evidence, and when the defendant's counsel called the judge's attention to this fact, the judge said: "Then I will withdraw my characterization of this, if it is desired, and will let the jury pass upon it—no, I will not do that, because I must construe the written document when it comes in, but I can only say that the jury may think, as I personally do think,—though my personal views are not controlling on the jury, that the jury will probably construe that document in the way I construe it" (277). When the defendant's counsel put on several wholesale grocers to disprove any understanding or agreement between themselves and the defendant, the judge subjected them to long and close cross examination (311-313, 316, 317, 322, 323, 325). When Mr. Edgerton, one of these witnesses, was asked whether he knew that the defendant "fixed the resale price on their goods," the judge, again answering for the witness, said: "My own judgment is that he has indicated that he did know it. That is the impression I gathered from his testimony, that he thought the Cudahy people, like dozens of others, Proctor & Gamble's, and others hundreds of them, fix their price, but he does not say it" (313). Mr. Edgerton had not so testified, as the summary of his testimony on earlier pages of this brief shows. Concerning the defendant's prayers, the judge said: "I will make a general statement on that. Gentlemen of the jury, this has been a case, it seems to me, exceedingly simple, but which has been very troublesome to follow, I think.

Counsel, appreciating from some standpoint that the case is quite an important one, and being very well learned in the law, have felt it their duty to their clients to put at their clients' services in this case all their learning, with the consequences that in the discharge of their duties to their clients it has turned out that it has been almost impossible for any of us to follow a story of any one witness very long because of the incidental questions as to admissibility and what not that were raised. And then counsel have felt it their duty to put their views of the law into writing, somewhat voluminously. I suppose I have a dozen prayers on one side and sixty-eight, I believe, on the other. In that view of the case, as I feel myself fairly well posted in the law, I made up my mind to reject all the prayers on both sides. As to the side with the sixty-eight prayers I can only say that I do not pretend to have examined them all or even many of them. I do not feel that in the limited time that was available in the course of the trial, that I was under obligation to do so. After I have finished my charge, if there are any special points that either side does not think have been sufficiently covered, if counsel will bring them to my attention by a request to charge, I will be very glad then to consider them. But it is impossible to act on sixty-eight propositions of law in such a narrow compass of time" (431-432). On being reminded that the defendant's counsel had handed up all these prayers a full day before, the judge continued: "That is perfectly true, but counsel is also very well aware that there were other things connected with this case that required the attention of the Court. There is not any case, un-

less it were a contract case involving a trial of one hundred separate suits in one, which would justify sixty-eight prayers" (432). At the end of the trial and before his charge the judge made this statement to the jury:

"I may say before I get into the actual review of the case that the defense asked me, in connection with an incident that happened on the first day, to say something to you. I see that counsel took what was said too seriously. I was surprised at the time because I had nothing in mind which, if understood, would have hurt anybody's feelings. But I find in looking over the stenographic notes, that it could be construed so as to be more or less offensive. It was that incident which occurred when counsel for defense was cross examining, Mr. Frey being on the stand, and counsel was trying to get in some part or all of a long communication that Mr. Frey had published in some newspaper somewhere, and he was asking various questions of Mr. Frey about it, and in the course of asking the questions he was reading sections of the article, whereupon he had been bowled over two or three times and Mr. Smith on the other side objected that counsel was doing what counsel very often do, there is no doubt in the world about that, trying to get matters before the jury by reading them or putting them in the form of a question in spite of the fact that the court was going to rule them out. That often has occurred and I guess there are very few members of the bar who have not done it. So Mr. Smith objected on

that ground. Well, as I say, that often is done; I did not pretend to pass upon whether counsel was unconsciously doing it at that time or not, but I felt the best to dispose of it was to make light of it as I did, and I said to counsel that anything of that kind that is being done the jury will see through it and punish it or something of that kind. I say that counsel took it much more seriously than the court had any intention that it should be taken" (433).

When the defendant's counsel excepted "to so much of your Honor's charge as indicates that an unlawful contract and combination or conspiracy or understanding is shown where it appears that in the absence of an express obligation some dealer, responding to a suggestion from Cudahy Packing Company, may have sold at the prices mentioned in its literature" (457), the judge said: "All I can say, on such questions is that the jury, when they come into this jury box, I do not suppose, leave their common sense behind" (457).

Exceptions to many statements of the judge were taken as set forth in defendant's Assignments Nos. 52, 54, 55 (pages 476-7), 104, 105, 106 (page 500), and exceptions to the judge's charge of a similar nature set forth in defendant's Assignments Nos. 128 (page 536), 131 (page 538) and 137 (page 541).

The foregoing statements of the judge were hardly conducive to a deliberate and impartial consideration and determination of the issues by the jury.

POINT XI.

The Circuit Court of Appeals' order should be affirmed, with costs and disbursements to the defendant.

January 11th, 1921.

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FREY & SON, INCORPORATED, *v.* CUDAHY
PACKING COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH
CIRCUIT.

No. 200. Argued March 16, 1921.—Decided April 18, 1921.

1. When the Circuit Court of Appeals reverses a judgment of the District Court in an action at law, and the defeated party brings the case here by waiving his right to new trial and consenting to entry of final judgment against him in the Circuit Court of Appeals, this court must affirm if error necessitating reversal was assigned and relied upon in that court even though the ground of the decision was different and untenable. P. 210. *Thomsen v. Cayser*, 243 U. S. 66.

208.

Opinion of the Court.

2. An agreement between manufacturer, jobbers and wholesalers to maintain resale prices, need not be formal to violate the Sherman Act, but may be implied from a course of dealing or other circumstances. P. 210. *United States v. Schrader's Son, Inc.*, 252 U.S. 85.
 3. But the mere facts that a manufacturer indicated a sales plan to wholesalers and jobbers fixing prices below which they were not to sell to retailers, and called this feature very often to their attention, and that most of them did not dissent but coöperated by selling at the prices named, do not suffice to establish an agreement or combination forbidden by the Sherman Act. P. 211.
- 261 Fed. Rep. 65, affirmed.

ERROR to review a judgment of the Circuit Court of Appeals reversing a judgment obtained by the present plaintiff in error in an action for triple damages under the Sherman Act in the District Court. The facts are stated in the opinion.

Mr. Horace T. Smith and *Mr. Charles Markell* for plaintiff in error.

Mr. Gilbert H. Montague, with whom *Mr. Thomas Creigh* and *Mr. Joseph W. Goodwin* were on the brief, for defendant in error.

MR. JUSTICE McREYNOLDS delivered the opinion of the court.

Alleging the existence of an unlawful contract, combination or conspiracy between the Packing Company, manufacturer of "Old Dutch Cleanser," and various jobbers for the maintenance of resale prices, and relying upon the Sherman Act (c. 647, 26 Stat. 209) as interpreted in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, Frey & Son, Inc., instituted this action in the District Court of the United States for Maryland to recover three-fold damages. Under an elaborate charge the issues were submitted to the jury for determination. Judgment for

\$2,139.00 entered (June 22, 1917) upon a verdict for plaintiff was reversed by the Circuit Court of Appeals July 16, 1919 (261 Fed. Rep. 65)—after decision of *United States v. Colgate & Co.* (June 2, 1919), 250 U. S. 300, and before *United States v. Schrader's Son, Inc.*, 252 U. S. 85. Plaintiff in error reserved its right of review here, waived a new trial and consented to entry of final judgment for the Packing Company. *Thomsen v. Cayser*, 243 U. S. 66.

The court below concluded "There was no formal written or oral agreement with jobbers for the maintenance of prices," and that considering the doctrine approved in *United States v. Colgate & Co.* the District Court should have directed a verdict for the defendant. Other errors by the trial court were assigned and relied upon. If any of them was well taken we must affirm the final judgment entered after waiver of new trial and upon consent as above shown.

It is unnecessary to repeat what we said in *United States v. Colgate & Co.* and *United States v. Schrader's Son, Inc.* Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances. Having regard to the course of dealing and all the pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer and jobbers was a question for the jury to decide, and that the Circuit Court of Appeals erred when it held otherwise.

Among other things the trial court charged:

"I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan

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to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually coöperating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act."

The recited facts, standing alone, (there were other pregnant ones) did not suffice to establish an agreement or combination forbidden by the Sherman Act. This we pointed out in *United States v. Colgate & Co.* As given the instruction was erroneous and material.

The judgment below must be

Affirmed.

MR. JUSTICE PITNEY, with whom concurred MR. JUSTICE DAY and MR. JUSTICE CLARKE, dissenting:

I am constrained to dissent from the opinion and judgment of the court. The action was brought by plaintiff in error, in part to recover threefold damages under § 7 of the Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209, 210, because of injuries sustained in its business by reason of an alleged combination or agreement for the maintenance of prices made between the Packing Company and various wholesalers and jobbers in its product known as "Old Dutch Cleanser." The declaration contained a second count, based upon alleged discrimination in violation of the Clayton Act of October 15, 1914, c. 323, §§ 2, 4, 38 Stat. 730, 731; but this calls for no special notice. A judgment rendered by the United States District Court upon the verdict of a jury in favor of plaintiff was reversed by the Circuit Court of Appeals (261 Fed. Rep. 65) upon the ground that the acts of defendant and its associates amounted to no more than an announcement in advance that customers were expected

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to charge prices fixed by defendant upon penalty of refusal to sell to an offending customer, observance of the request by customers generally, and actual enforcement of the penalty by refusing to sell to such customers as failed to maintain the price; and hence that under the decision of this court in *United States v. Colgate & Co.*, 250 U. S. 300, there was no ground of recovery under the Anti-Trust Act.

I agree with the court that the Circuit Court of Appeals misapprehended the effect of our decision in the case cited, and that under rules laid down in *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 399-400, 408; and *United States v. Schrader's Son, Inc.*, 252 U. S. 85, 99, the trial judge was right in submitting the case to the jury.

Notwithstanding its conclusion that the Court of Appeals erred in holding that a verdict ought to have been directed in favor of defendant, the majority holds that the judgment under review here ought to be affirmed, because of supposed error in an instruction given to the jury (a new trial having been waived by plaintiff on consenting to entry of final judgment for the Packing Company by the Circuit Court of Appeals under the practice followed in *Thomson v. Cayser*, 243 U. S. 66, 83).

The instruction to which error is attributed related to the question whether a combination between defendant and the wholesalers and jobbers for the purpose of maintaining resale prices had in fact been shown. After referring to the method pursued by defendant in marketing "Old Dutch Cleanser," and stating that under the law defendant could not be held liable under the first count unless it was a party to a contract or combination or conspiracy to fix and maintain prices; that defendant denied it was a party to any such combination, contract, or conspiracy, and insisted it had merely notified the jobbing trade what prices it thought were the lowest at which jobbers would resell its product at sufficient return

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to make it worth their while to push the sale of such product; that plaintiff admitted that, with reference to most of the jobbers at least, there was no written and signed agreement on the subject, and none couched in any formal or express terms; but that defendant from time to time had issued circulars to the trade urging the importance of maintaining "uniform and fair jobbing and retail prices and trading provisions" and stating that "any sales by jobbers at special prices would . . . demoralize prices and disturb the entire business in these products," and that "uniformity and equality, as to terms, delivery and price is essential. It is therefore required of our distributing agents that they fully coöperate with us in this direction, as per terms, conditions and prices laid down in our published General Sales List;" and that upon bills sent to wholesalers by defendant there was stamped a notice that "All your quotations, bids, sales and invoices for Old Dutch Cleanser either to jobbers, semi-jobbers, retailers or consumers, should be at a rate not lower than laid down in our published General Sales List;" the trial judge proceeded, as to the particular question whether in fact there was a combination, to speak thus: "I can only say to you that if you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it out by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-Trust Act."

Passing for the moment the question whether this was legally erroneous, I am unable to find in the record any

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basis for attributing error to the trial judge in respect to it, because it was not made the subject of any proper exception. The trial was litigiously contested, defendant having taken no less than 157 exceptions, of which 20 were directed to the charge given to the jury. Among them, however, I can find none that challenges the proposition embodied in the instruction now held to be erroneous, recites either the words or the substance of that instruction, or otherwise fairly identifies it so as to bring it to the attention of the trial judge. Defendant relies upon an exception which reads as follows: "I also respectfully except to so much of your Honor's charge as indicates that an unlawful contract and combination or conspiracy or understanding is shown where it appears that in the absence of an express obligation some dealer, responding to a suggestion from Cudahy Packing Company, may have sold at the prices mentioned in its literature." To which the judge responded: "All a question of fact for the jury. All I can say on such questions is that the jury, when they come into this jury box, I do not suppose, leave their common sense behind."

There is nothing here to show that the attention of the trial judge either was or ought to have been directed to that part of his charge now held to be erroneous. The exception alleged did not even faintly or approximately express the tenor and effect of that instruction or of any other that was given to the jury; much less did it fairly and distinctly raise a question of law upon this or any other point in the charge.

It is elementary that, in order to lay foundation to review by writ of error the proceedings of the courts of the United States in the trial of common-law actions, the questions of law proposed to be reviewed must be raised by specific, precise, direct, and unambiguous objections, so taken as clearly to afford to the trial judge an opportunity for revising his rulings; and that a bill of exceptions not

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fulfilling this test will furnish no support for an assignment of error. To quote from some of the decisions: "One object of an exception is to call the attention of the circuit judge to the precise point as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so." *Beaver v. Taylor*, 93 U. S. 46, 55. "While it is the duty of this court to review the action of subordinate courts, justice to those courts requires that their alleged errors should be called directly to their attention, and that their action should not be reversed upon questions which the astuteness of counsel in this court has evolved from the record. It is not the province of this court to retry these cases *de novo*." *Robinson & Co. v. Belt*, 187 U. S. 41, 50. "It has been too frequently held to require the extended citation of cases that an exception of this general character will not cover specific objections, which in fairness to the court ought to have been called to its attention, in order that if necessary, it could correct or modify them. . . . In such cases it is the duty of the objecting party to point out specifically the part of the instructions regarded as erroneous." *McDermott v. Severe*, 202 U. S. 600, 610. "The primary and essential function of an exception is to direct the mind of the trial judge to a single and precise point in which it is supposed that he has erred in law, so that he may reconsider it and change his ruling if convinced of error, and that injustice and mistrials due to inadvertent errors may thus be obviated. An exception, therefore, furnishes no basis for reversal upon any ground other than the one specifically called to the attention of the trial court." *United States v. United States Fidelity & Guaranty Co.*, 236 U. S. 512, 529. See, also, *Guerini Stone Co. v. Carlin Construction Co.*, 248 U. S. 334, 348; *Fillippon v. Albion Vein Slate Co.*, 250 U. S. 76, 82.

Not only the trial judge, but the opposing party has

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rights that one who objects to the course of the proceedings is bound to respect, if he seeks a review by writ of error. To permit the result of a trial to be set at naught because of an objection that has no proper relation to any ruling made unless it be taken in a sense entirely variant from the language expressed by objecting counsel, would render the fair and orderly conduct of a trial impossible and place a premium upon ambiguity and even trickery. Upon the present record, it would be most unjust to the plaintiff, as well as to the trial judge, to call upon the latter, wearied as he must have been in the course of such a trial, to recognize in the one hundred and fifty-fourth objection a challenge of the legal accuracy of an instruction that he had expressed in language so very different.

But, were the instruction duly excepted to, I am unable to assent to the view that it was erroneous. The jury were not told that from the facts recited, if believed, an agreement or combination forbidden by the act of Congress necessarily resulted, but only that from those facts, together with other and undisputed facts that were in evidence, they reasonably might find there was such an agreement or combination. It is settled beyond controversy that an agreement in order to be a violation of the act need not be expressed, but may be "implied from a course of dealing or other circumstances" (*United States v. Schrader's Sons, Inc.*, 252 U. S. 85, 99). And, while naturally it influences the action of the participants, it of course need not be such as to control them in a legal sense. From the very fact that it is a violation of the law it cannot be legally binding; and it is only as a *de facto* agreement, or understanding, or combination, that the conspiracy in restraint of trade need control the conduct of the participants in order that it may constitute a violation of the act.

Reading the criticized instruction in the light of the other parts of the charge, it amounted to no more than

telling the jury that if defendant had a sales plan that, if assented to and carried into effect, would constitute a fixing of prices in restraint of interstate trade and commerce, and the particulars of this plan were repeatedly communicated by defendant to the many wholesalers and jobbers with whom it had relations, and if the great majority of them not only did not express dissent from the plan but actually coöperated in carrying it out by themselves adhering to its details; the jury reasonably might infer that they did mutually give assent to the plan, equivalent to an agreement or combination to pursue it. In short, that upon finding many persons, actuated by a common motive, exchanging communications between themselves respecting a plan of conduct and acting in concert in precise accordance with the plan, the jury might find that they had agreed or combined to act as in fact they did act; that their simultaneous pursuit of an identical programme was not a miraculous coincidence, but was the result of an agreement or combination to act together for a common end.

The opinion states no ground upon which the instruction is held to be erroneous; the elaborate brief submitted in behalf of the Packing Company specifies no criticism upon it; and I am unable to discern adequate reason for condemning it. It suggested a perfectly natural and legitimate inference that might be drawn by the jury from the facts in evidence; having included in the recital the very same facts and circumstances, indeed, upon which this court now unanimously holds that the case was for the jury. Concerted action is of the essence of a conspiracy (*Pettibone v. United States*, 148 U. S. 197, 203); and it is "hornbook law" that where concerted action is found to exist following an interchange of communication between the actors, it gives ground for a reasonable inference of an agreement to act in concert. Just as the mechanism of a watch affords evidence of a design, and

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hence of a designer; so a systematic course of action, pursued at one and the same time by many persons and affecting their mutual interests, raises a fair inference of an agreement between them to pursue that course of action. Juries in conspiracy cases are instructed to this effect every day, without disapproval; and it seems to me the permitted inference is in accord with common sense and the ordinary rules by which men's motives and secret understandings are judged from their acts.

I find nothing in the *Colgate & Co.* decision to support a criticism of the judge's instruction. There the indictment, under the interpretation adopted by the trial court and necessarily accepted by us, failed to charge the making of any agreement, either express or implied, that imported an obligation to observe specified resale prices. This was the very ground of our decision, as was pointed out in the case of *Schrader's Son, Inc.*, 252 U. S. 99. Here the state of the evidence, as this entire court now holds, required the trial court to submit to the jury the question of fact whether an agreement to observe the specified resale prices was to be inferred from the course of dealing and other circumstances. The trial judge fairly summarized the pertinent facts and circumstances disclosed by the record regarding the course of dealing between the parties, from which the alleged agreement, combination, or conspiracy in restraint of trade might or might not be inferred, and then, in the clause now criticized, submitted to the jury the question of fact whether one should be inferred. I am unable to see in what respect he failed to conform to correct practice and the decisions of this court; or how, if his instruction was erroneous, a trial judge can correctly submit to a jury the question whether, from a course of dealing and other circumstances, an agreement to fix prices in restraint of trade shall be found.

The circumstances from which the trial judge permitted an inference of conspiracy to be drawn seem to me stronger

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than those held sufficient by this court in *Thomsen v. Caysner*, 243 U. S. 66, 84, where there was no direct proof of the terms of any conference or agreement participated in by the defendants, and the principal evidence consisted of circulars issued and a concerted course of dealing under which certain steamship owners operated their vessels in the trade from New York to South African ports without competing with one another; upon the strength of which the court rejected the suggestion that the circulars and the concerted course of dealing under them were accidental and without premeditation followed by unity in execution. So in *Eastern States Retail Lumber Dealers' Association v. United States*, 234 U. S. 600, 607-609, 612, there was no express agreement among the retailers to refrain from dealing with the listed wholesalers, nor any penalty for failing to do so. But the court found, in the systematic and periodical circulation of certain confidential information, commonly called black-lists, intended to guide the action of the recipients and cause them to withhold patronage from the listed concerns, sufficient evidence of a conspiracy in restraint of trade; saying, p. 612: "It is said that in order to show a combination or conspiracy within the Sherman Act some agreement must be shown under which the concerted action is taken. It is elementary, however, that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when in this case by concerted action the names of wholesalers who were reported as having made sales to consumers were periodically reported to the other members of the associations, the conspiracy to accomplish that which was the natural consequence of such action may be readily inferred." Here the character of the communications was different; but as evidence, when taken in connection with the concerted action that followed, they have the same tendency to show a conspiracy.

Authorities easily might be multiplied, but it is unnecessary. Convinced that the ruling now made, if adhered to, will seriously hamper the courts of the United States in carrying into effect the prohibition of Congress against combinations in restraint of interstate trade, I respectfully dissent from the opinion and judgment of the court.

MR. JUSTICE DAY and MR. JUSTICE CLARKE concur in this dissent.